TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 163.

ATLANTIC AND PACIFIC TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF PHILADELPHIA.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED SEPTEMBER 12, 1901.

(18,264.)

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation (copy)	3	1
Transcript from State court	4	2
Exemplification	4	2
Docket entries	4	2
Præcipe for summons	5	2
Summons and service	6	3
Statement of claim	8	3
Exhibit A—Ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the city of Philadelphia	11	5
B—Ordinance to provide for the payment of an annual charge for the use of telegraph poles belonging to the city of Philadelphia, and to carry the same into effect	16	7
C—Ordinance to regulate the introduction and use of underground conduits, wires, and cables for electrical conductors in the streets of the city of Philadelphia, &c.	20	8
Appearance for defendant	29	12
Order for removal	30	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1902.

	Original.	Print
Petition for removal	31	13
Bond for removal	33	14
Clerk's certificate	36	15
Affidavit of defense	37	15
Appearance for plaintiff	40	17
Pleas	41	17
Amended statement of claim	42	17
Exhibit A—Ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the city of Philadelphia	45	19
B—Ordinance to regulate the introduction and use of underground conduits, wires, and cables for electrical conductors in the streets of the city of Philadelphia, &c.	50	21
Rule as to amendment, &c.	58	24
Plea	59	25
Jury	60	25
Verdict	60	25
Bill of exceptions	61	25
Statement	61	26
Evidence for plaintiff	63	26
Ordinance of January 6, 1881	63	26
March 30, 1883	68	28
August 5, 1886	76	32
Evidence for defendant	83	35
Testimony of Wm. B. Gill	83	35
Exhibits offered	112	49
Extracts from Report of the Chief of Electrical Bureau	112	49
Evidence for plaintiff in rebuttal	117	51
Testimony of Abraham M. Beitler	117	51
Testimony of David R. Walker	130	56
Exhibit No. 1—Statement covering the actual cost of maintenance and keeping in repair all owned and leased wires in the sixth district, eastern division, W. U. Tel. Co., from 1885 to 1891, inclusive	136	59
No. 2—Amount of license charges for maintenance of poles and wires overhead for telegraph, telephone, and electric light purposes in the city of Philadelphia	137	59
No. 3—Statement of the number of telegraph poles and miles of telegraph wire belonging to the city of Philadelphia erected and maintained in and over the streets thereof during the years 1885 to 1891, inclusive	138	60
No. 4—Statement of the salaries of the chief of electrical bureau of the city of Philadelphia and his assistants, clerks, linemen, &c., for the years 1885 to 1891, inclusive.	139	60
Testimony of David R. Walker (resumed)	142	61
Daniel J. McNamara	167	73
Edward A. Waters	169	74
Wm. D. Marks	173	76

	Original.	Print
Evidence for defendant in rebuttal	180	79
Exhibits offered	180	79
Extracts from department report of 1890	181	79
Exhibit No. 5—Form for report to department of public safety	182	80
No. 6—Rules and regulations of the department of public safety	183	80
No. 7—Statement of overhead and underground wires	189	83
Charge to jury	190	83
Judge's certificate to bill of exceptions	194	85
Motion for reduction of amount of verdict	195	85
Opinion on motion	196	85
Stipulation as to amount of damages, &c.	199	87
Assignment of errors	201	87
Petition for writ of error	203	88
Bond on writ of error	206	90
Stipulation as to record	208	91
Clerk's certificate	210	91

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you between Atlantic and Pacific Telegraph Company plaintiff in error and City of Philadelphia, defendant in error a manifest error hath happened, to the great damage of the said Atlantic and Pacific Telegraph Company, as by its complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right,
2 and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 2nd day of August in the year of our Lord one thousand nine hundred and one.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of the Circuit Court of the United States.

Allowed
BY THE COURT.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to City of Philadelphia, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C. within thirty days, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, eastern district of Pennsylvania wherein The Atlantic and Pacific Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John B. McPherson, judge, holding circuit

court of the United States, this third day of August, in the year of our Lord one thousand nine hundred and one.

JOHN B. McPHERSON, *J.*

Service accepted
E. SPENCER MILLER,
Ass't City Solicitor.

4 *Exemplification.*

PHILADELPHIA COUNTY, } *sct:*
State of Pennsylvania, }

Among the records and proceedings of the court of common pleas, No. 4 for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record, at No. — December term, 1891, to wit:

Docket Entries.

December term, 1891.

CITY OF PHILADELPHIA
vs. } 319.
ATLANTIC AND PACIFIC TELEGRAPH COMPANY.

Miller & Warwick
Read & Pettit
Jan. 21, 1892

Sum's assumpsit exit Dec. 31, 1892
Ret. 1 Mon. Jan. 1892
Served writ & statement Jan. 4 1892
Jan. 18, 1892.—Petition of def't for removal of case to U. S. circuit court filed
Eo die.—Bond filed
Feb'y 27, 1892.—Rule absolute
Eo die.—Ordered that def't be and hereby is authorized
5 and permitted to remove cause to U. S. circuit court as in its petition prayed.

CITY OF PHILADELPHIA
vs. } C. P. No. 4, Dec. Term, 1891. No. —.
ATLANTIC AND PACIFIC TELEGRAPH.

Precipe for Summons.

To the prothonotary, court of common pleas No. 4:

Issue summons assumpsit against the above-named defendant.

E. SPENCER MILLER,
Ass't City Solicitor.
CHARLES F. WARWICK,
City Solicitor.

(Endorsed:) 319 D. T. 1891 C. P. 4 City *v.* Telegraph Co. Præcipe for summons Filed Dec. 31, 1891 W. MacCain pro proth'y E. Spencer Miller Chas. F. Warwick

6 *Summons.*

COUNTY OF PHILADELPHIA, *ss:*

[SEAL.] The Commonwealth of Pennsylvania to the sheriff of the county of Philadelphia, Greeting:

We command you that you summon Atlantic and Pacific Telegraph late of your county, so that it be and appear before our judges, at Philadelphia, at our court of common pleas, No. 4 of the county of Philadelphia, to be holden at Philadelphia, in and for said county, on the first Monday of January next, there to answer City of Philadelphia of a plea of assumpsit. And *to* have you then and there this writ.

Witness the Honorable M. Russell Thayer president judge of our said court, at Philadelphia the 31st day of Dec. in the year of our Lord, one thousand eight hundred and ninety-one (1891)

W. MACCAIN,
Pro Prothonotary.

(Endorsed.)

Served The Atlantic and Pacific Telegraph Company by giving January 4, 1892 a true and attested copy of the within writ to W. B. Gill superintendent of said company and making known to him the contents thereof

So answers

PETER SAYBOLT,
Deputy Sheriff.
HORATIO P. CONNELL, *Sheriff.*

7 319 Dec. term 1891 Court of common pleas No. 4 City of Philadelphia *vs.* Atlantic & Pacific Telegraph Company Summons assumpsit Statement Miller Warwick

8 THE CITY OF PHILADELPHIA *vs.* ATLANTIC & PACIFIC TELEGRAPH CO. } C. P. No. 4, Dec. Term, 1891. No. —.

Statement.

The plaintiff claims of the defendant the sum of $3715.00 with interest from the 31st day of December of each year hereinafter stated, being the sum total of charges due to the said plaintiff by the defendant, according to the following specifications.

The proper authorities of the city of Philadelphia duly passed, December 21st, 1880, an ordinance entitled "An ordinance to provide for the payment of an annual charge for the use of telegraph poles belonging to the city of Philadelphia, and to carry the same

into effect," and on the 6th day of January, 1881, an ordinance entitled "An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the city of Philadelphia," and on the 30th day of March 1883 an ordinance entitled "An ordinance to regulate the introduction and use of underground conduits, wires and cables for electrical conductors in the streets of the city of Philadelphia, and to provide for charges for underground, overground, or overhead wires, and to repeal an ordinance entitled 'An ordinance to regulate the introduction and use of underground conduits, electrical cables and wires for electrical conductors, in
9 the streets of the city of Philadelphia, and to provide for charges for overground wires,' approved June 21, 1882" Copies of said ordinances are attached hereto as Exhibits A, B, and C, that the same may be taken as a part of this statement.

The said defendant, prior to and since the first day of January, 1885, has used the poles belonging to the city of Philadelphia and has attached thereto telegraph and telephone wires and fixtures of the length hereinafter indicated, and has certified accordingly to the superintendent of the police and fire-alarm telegraph, under the terms of the ordinance above referred to, approved 30 March 1883.

The said defendant has erected and maintained poles within the corporate limits of the city of Philadelphia to the number hereinafter stated.

The said defendant has maintained wires on poles other than those belonging to the city of Philadelphia and on buildings, of the length hereinafter stated, and has certified accordingly to the superintendent of the police and fire-alarm telegraph, under the terms of the ordinance above referred to, approved March 30, 1883.

10

	In the year 1885.	In the year 1886.	In the year 1887.	In the year 1888.	In the year 1889.	In the year 1890.	Aggregate.
No. of miles of wire attached to city poles at $2.50	16	6	.....	.....	....	1	57.50
No. of poles maintained at $1.00	312	312	312	303	303	293	1835.00
No. of miles of wire maint'd on poles other than those belonging to the city & on bldgs., at $2.50	134	144	147	145	145	14	1822.50
Sum total	.....	.....	.....	.....	.....	.....	3715.00

By reason whereof the said defendant, by force of said ordinance is indebted to the said plaintiff in the sum of $3715.00 with interest as aforesaid, wherefore said plaintiff brings his suit.

Edwin S. Stuart, being duly sworn, according to law, deposes and says the facts above stated are true.

——— ———.

Sworn and subscribed before me this 31st day of December A. D. 1891.

——— ———.

11 EXHIBIT A.

An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the city of Philadelphia.

Whereas, great inconvenience and annoyance have been occasioned to property-owners by the placing of telegraph poles in front of their premises.

And whereas, the lives and property of citizens travelling upon the public streets and highways have been imperilled by the erection and maintenance of inadequate or unsound telegraph poles thereon, so that it has become necessary to establish a system for the proper inspection of such poles, and for the regulation of the erection and maintenance thereof; therefore,

SECTION 1. The select and common councils of the city of Philadelphia do ordain, That whenever permission shall have been granted by councils to any corporation, firm, or individual, to construct a line of telegraph which requires the erection of poles in or upon any of the public streets or highways within the corporate limits of the city of Philadelphia, it shall be the duty of such corporation, firm, or individual, before any pole shall be erected, to submit to the superintendent of the police and fire-alarm telegraph a written application specifying the number and size of poles intended to be erected, and designating the places where the same are intended
12 to be inserted, and if no objection be made hereto it shall be the duty of the said superintendent of the police and fire-alarm telegraph to issue a license to the said applicant for the erection of the specified poles at the designated places of insertion. In case of objections being made to the whole or any part of such application, it shall be the duty of the superintendent of the police and fire-alarm telegraph to hear the same and to grant the license either in accordance with the application or with such conditions and modifications to secure the purposes of this ordinance as the case may require.

No pole shall be newly erected without the license of the superintendent of the police and fire-alarm telegraph shall have been previously obtained therefor as provided in this section, and for every license so granted there shall be paid to the city treasurer, for the use of the city, the sum of five (5) dollars per pole.

SECT. 2. It shall be the duty of the superintendent of the police and fire-alarm telegraph to cause a thorough and careful inspection to be made, at least once in every year, of all telegraph or telephone poles erected within the corporate limits of the city of Philadelphia, and if any pole shall be found defective or dangerous from any

cause, he shall notify the corporation, firm or individual owning such pole, who shall forthwith replace the same with a sound pole; and if the said owner neglect or refuse to replace such de-
13 fective pole within forty-eight hours after receiving such notification, he or they shall be liable to a fine of five (5) dollars for each and every day during which said neglect or refusal shall continue, to be collected as debts of like amount are now by law recoverable.

SECT. 3. All telegraph poles now erected, or hereafter to be erected in the city of Philadelphia, which are or shall be owned by any corporation, firm, or individual, shall be designated by the names or initials of such owner, and each of said poles shall bear a distinctive number, together with the names or initials, and number shall be legibly marked with oil paint upon the poles so designated. It shall be the duty of every such owner or owners, on or before the first Monday of February, and annually thereafter on the first Monday of January in each and every year, to make application to the superintendent of the police and fire-alarm telegraph for a license to maintain the poles theretofore erected for the ensuing year specifying the poles so to be maintained by their designation as provided for in this section, and the superintendent of the police and fire-alarm telegraph shall issue a license to such applicant which shall authorize the maintenance of the poles designated in the application, only for the period of one year from the first day of January next ensuing the date of said application, and no longer; and the charge for issuing such license shall be the sum of one (1) dollar for
14 each and every pole authorized to be maintained thereby, and shall be paid to the city treasurer for the use of the said city.

SECT. 4. On and after the first day of January, A. D. 1881, no telegraph pole shall be maintained within the corporate limits of the city of Philadelphia without an annual license for the maintenance thereof shall have been previously granted for the same, in accordance with the provisions of section 3 of this ordinance; any privilege heretofore granted by resolution or ordinance for the erection and maintenance of poles for telegraphic or telephonic purposes be, and the same are, hereby repealed. Any person or persons violating the provisions of this section shall be liable to a fine of fifty (50) dollars for each and every telegraph pole so maintained without license, to be recovered as debts of like amount are now by law recoverable.

SECT. 5. Upon complying with the provisions and requirements of this ordinance the privileges heretofore granted to such individuals, companies, or corporations by resolution or ordinance shall not be in any way affected. The councils of the city of Philadelphia, however, reserves the right to revoke by ordinance any of the privileges mentioned in this or any other ordinance or resolution.

JOS. L. CAVEN,
President of Common Council.

Attest: JOSEPH H. PAIST,
Clerk of Select Council.

15 JOHN McCULLOUGH,
President pro Tem. of Select Council.

Approved this sixth day of January, anno Domini one thousand eight hundred and eighty-one (A. D. 1881).

WILLIAM S. STOKLEY,
Mayor of Philadelphia.

16 EXHIBIT B.

An ordinance to provide for the payment of an annual charge for the use of telegraph poles belonging to the city of Philadelphia, and to carry the same into effect.

SECTION 1. The select and common councils of the city of Philadelphia do ordain, That all individuals, companies or corporations now using, or who may hereafter use or attach any telegraph or telephone wires or fixtures to the telegraph poles belonging in whole or part to the city of Philadelphia, shall pay to the city treasurer for the use of said city annually the sum of fifty (50) cents for each and every attachment made to each and every pole.

SECT. 2. Each and every individual, company, or corporation, having telegraph or telephone wires or fixtures attached to the telegraph poles owned in whole or in part by the city of Philadelphia shall, in writing, on or before the first day of March, 1881, and annually thereafter on or before the first day of January, certify to the superintendent of the police and fire-alarm telegraph the number and location of such attachments; and upon complying with the provisions and requirements of this ordinance, the privileges heretofore granted to such individuals, companies, or corporations, by resolution or ordinance, shall not be in any way affected.

17 SECT. 3. It shall be the duty of the superintendent of the police and fire-alarm telegraph to furnish the city treasurer, on or before the second Monday of March, 1881, and annually thereafter on or before the second Monday of January, the number of and location of said attachments for which each individual, company, or corporation, is liable and required to pay for under this ordinance; and it shall be the duty of such individual, corporation, or company, to pay to the city treasurer for the use of the city as aforesaid, the charge or amount due on such attachments within thirty (30) days after the return, as hereinbefore specified, is made by the superintendent of the police and fire-alarm telegraph.

SECT. 4. Upon the failure of any individual, company, or corporation, to pay to the city treasurer, on or before the time specified in section 3 of this ordinance, the sum or amount due by such individual, company, or corporation, for the privileges hereinbefore specified, notice of such failure to pay shall in writing be furnished by the city treasurer to the superintendent of the police and fire-alarm telegraph within fifteen (15) days thereafter; and the superintendent of the said police and fire-alarm telegraph is hereby directed and authorized, upon the receipt of said notice, to proceed at once and remove from said poles any telegraph or telephone wires, fixtures, or attachments belonging to or placed there by such defaulting individuals, companies, or corporations.

18 SECT. 5. That hereafter no individual, company, or corporation, shall place any telegraph or telephone wires or fixtures on any telegraph pole or poles owned in whole or part by the city of Philadelphia, without permission is first given by these councils, by the passage of an ordinance to that effect. And in case any wire, wires, or fixtures, shall be placed on any such pole or poles, without such authority first obtained, then the superintendent of the police and fire-alarm telegraph is required and directed to remove the same without notice.

SECT. 6. It shall be the duty of the superintendent of the police and fire-alarm telegraph to furnish, within fifteen days after the passage of this ordinance, a certified copy thereof to all individuals, companies, or corporations, affected by the provisions thereof.

SECT. 7. All privileges heretofore granted by resolutions or ordinances, or by the provisions of this ordinance, shall be revocable by the passage of an ordinace without notice to that effect; and all ordinances, resolutions, or parts of ordinances and resolutions inconsistent with the provisions of this ordinance are hereby repealed.

JOS. L. CAVEN,
President of Common Council.

Attest: ALEX. J. McCLEARY,
Assistant Clerk of Select Council.

GEO. A. SMITH,
President of Select Council.

19 Approved this twenty-first day of December, anno Domini, one thousand eight hundred and eighty (A. D. 1880).

WILLIAM S. STOKLEY,
Mayor of Philadelphia.

20 EXHIBIT C.

An ordinance to regulate the introduction and use of underground conduits, wires and cables for electrical conductors in the streets of the city of Philadelphia, and to provide for charges for underground, overground or overhead wires, and to repeal an ordinance entitled "An ordinance to regulate the introduction and use of underground conduits, electrical cables and wires for electrical conductors, in the streets of the city of Philadelphia, and to provide for charges for overground wires," approved June 21, 1882.

SECTION 1. The select and common councils of the city of Philadelphia do ordain, That all corporations, firms and persons to whom permission has heretofore, or which may hereafter be granted, for running or laying underground conduits, tubes or pipes for electrical conductors, or cables, or wires, or all corporations, firms and persons to whom permission has heretofore, or which may hereafter be granted, for the erection of poles, fixtures, cables, wires and conductors in or over the streets or housetops in the city of Philadelphia, shall conform to the requirements of this general ordinance.

SECT. 2. That no street, alley, lane or road in the city of Philadelphia shall be broken or occupied by any corporation, firm or person, for the purpose of laying down conduits, tubes or pipes for electrical conductors, cables or wires, unless authority by
21 ordinance be first obtained. That during the construction or laying of said underground conduits, tubes, pipes, conductors, cables and wires, no street, alley, lane or road shall be opened, or the paving broken into, for a greater distance than five hundred (500) feet at any one time, and that no section of five hundred (500) feet shall be kept open for a longer period than five (5) days; and said opening or trench shall not be of a greater width than two (2) feet, and as the work progresses the paving shall be promptly relaid, and the street, alley, lane or road put in good condition.

SECT. 3. Prior to making an opening in any street, alley, lane or road for the laying of conduits, tubes, or pipes for electrical conductors, cables or wires, the corporation, firm or person desiring to lay the same shall make application in writing to the department of police and fire-alarm telegraph, and shall file plans and specifications with said department, showing the location, route and length of the proposed conduits, pipes or tubes, and on the issuance of a certificate to the effect that the route or routes and plans and specifications meet with the approval of the superintendent of the police and fire-alarm telegraph, the chief engineer and surveyor and the chief commissioner of highways; thereupon the chief commissioner of highways shall have authority to issue the necessary permit, on compliance with the provisions of section 9 of this ordinance, for the opening of such street, alley, lane or road, as set forth in the applica-
22 tions and plans as are proposed to be occupied. In addition to filing the plans and specifications as hereinbefore provided, duplicates of the same shall also be filed in the department of highways and surveys, and neglect on the part of the applicant to file such papers on the opening of any street, alley, lane or road, without a permit having been first obtained, shall forfeit the right of any corporation, firm or person, to use or occupy any street, lane, alley or road. The work of laying underground conduits, tubes, pipes, electrical conductors, cables and wires shall be under the direction and to the satisfaction of the superintendent of the police and fire-alarm telegraph, who at all times shall have free and unobstructed access to the conduits, tubes, pipes, electrical conductors or cables, for the purpose of inspecting the same, or making connections therewith for wires or conductors in use or to be used by the city.

SECT. 4. That all corporations, firms or persons occupying any street, alley, lane or road, with underground conduits, tubes, pipes, cables, electrical conductors or wires, shall be liable for all damages to gas and water mains, services and sewers, connections to sewers, and also for any damages caused by the opening of trenches, or condition of the streets, alleys, lanes or roads resulting from the laying of the conduits, tubes, pipes, electrical conductors, cables or wires, or making connection for which the city of Philadelphia

would otherwise be liable; and the bond provided in sec-
23 tion 9 of this ordinance shall contain a provision to that effect.

SECT. 5. That when the city of Philadelphia may desire to use or occupy any of the wires or conductors in any of the conduits, tubes, pipes or cables, for police, fire-alarm or other municipal purposes, the corporation, firm or person, to whom privileges have heretofore, or shall hereafter be granted, for the laying of underground conduits, tubes, pipes, electrical conductors, cables or wires, shall furnish the superintendent of the police and fire-alarm telegraph with one and not more than three conductors or wires, upon thirty days' notice to any such corporation, firm or person, free of any cost to said city. The superintendent of police and fire-alarm telegraph to have the whole and absolute control of such electrical conductors or wires as he shall elect to use for the purpose named.

SECT. 6. That all corporations, firms or persons having telegraph, telephone, or electric lighting wires, electrical conductors, or cables on telegraph poles belonging in whole or in part to the city of Philadelphia, or on any other poles or fixtures, or over housetops, or in any way suspended above ground or placed underground, shall, in writing, on or before the first Monday of April, eighteen hundred and eighty-three (1883) and annually thereafter, on or before the second Monday of December, certify under oath to the superintend-
ent of the police and fire-alarm telegraph the actual number
24 of wires, location, and the miles of wire and electrical conductors, whether suspended singly or in cable, tubes, pipes or conduits, above ground or underground, owned, leased or controlled by them in the city of Philadelphia. Failure to make such a return within the time provided for in this ordinance shall subject the offenders to a penalty of fifty (50) dollars per day until such return is made.

SECT. 7. That on all conductors or wires suspended above ground, excepting such as are used or owned by the city of Philadelphia, an annual payment of five (5) dollars per mile or any part thereof in length for conductors for electrical lighting purposes for each and every wire or conductor, and of two (2) dollars and fifty (50) cents per mile or part thereof in length of wires or conductors for each and every wire or conductor used or to be used for telegraphic, telephonic, or other purposes; and on all wires or conductors placed underground excepting such as are used or owned by the city of Philadelphia, an annual payment of two (2) dollars and fifty (50) cents per mile or any part thereof in length for conductors or wires for electrical lighting purposes for each and every wire or conductor, and one (1) dollar per mile or part thereof in length of conductors or wires for each and every wire or conductor used or to be used for telegraphic, telephonic, or other purposes, shall be paid to the city treasurer on or before the first Monday of May, 1883, and annually thereafter, in advance on or before the first Monday
25 of January. Failure to make payment as required within the time herein specified shall subject the offenders to a penalty of fifty (50) dollars per day for each and every day thereafter

until payment is made. All penalties provided for in this ordinance shall be recovered as like penalties are now by law recoverable.

SECT. 8. That an annual license charge of five (5) cents per running foot on all underground conduits, tubes or pipes for electrical conductors not exceeding twelve (12) inches in diameter, be made, and on all other conduits, tubes or pipes for like purpose, exceeding twelve (12) inches in diameter, an annual license charge of ten (10) cents per running foot be made payable to the city of Philadelphia, at the same time and under the same provisions as are provided in section 7, for the payment of charges for conductors and wires.

SECT. 9. That any corporation, firm or person shall, before erecting or laying any conduits, tubes, pipes, cables, electrical conductors or wires, give a bond and warrant of attorney, with good and sufficient security in real estate, to be filed of record, or Government, State or city bonds, to the city of Philadelphia, in the sum of twenty thousand (20,000) dollars, conditioned, that they shall properly relay and pave all openings made by it or them, and thereafter keep in repair the paving over said openings, and that they will make return and pay the annual license charge for underground conduits,
26 tubes, and pipes, including all the electrical conductors and wires contained in said conduits, tubes, pipes or cables, as well as the annual license charge for all overhead wires, cables or conductors, as hereinbefore provided, and will comply with the provisions of this ordinance and of all other ordinances now in force or hereafter to be passed, regulating the introduction, use, maintenance, taxation or license charges of telegraph, telephone, electrical conduits, conductors, wires or cables in the city of Philadelphia. The said bond shall be approved by and filed with the city solicitor, and a certificate of such approval and filing shall be furnished to the chief commissioner of highways before he shall issue a permit for the opening of any street, alley, lane or road, and the corporation, firm or person shall also pay to the city treasurer the sum of fi-ty (50) dollars, for the publication of the ordinance authorizing it or them to lay such conduit, tube, pipe, conductor, wire or cable.

SECT. 10. That if any underground conduit company or individual should at any time dispose of any of the franchises granted by any ordinance of councils, or consolidate with any other company, the company so selling or consolidating shall forfeit all rights and privileges granted by such ordinance, and shall be liable to, and shall pay to, the city of Philadelphia a penalty of twenty-five thousand (25,000) dollars, to be sued out and collected by the city
27 solicitor; the company or individuals buying from or consolidating with aforesaid individuals or companies shall be liable and shall pay to the city of Philadelphia the sum of twenty-five thousand (25,000) dollars, to be sued out and collected as hereinbefore prescribed.

SECT. 11. That any corporation, firm or person erecting or laying any conduits, tubes, pipes, cables, electrical conductors or wires, shall erect or lay such conduits, tubes, pipes, cables, electrical conductors or wires clear of all other pipes.

SECT. 12. That the ordinance entitled "An ordinance to regulate

the introduction and use of underground conduits, electric cables and wires for electrical conductors in the streets of the city of Philadelphia, and to provide for charges for overground wires," approved June 21, 1882, as well as all other ordinances or parts of ordinances inconsistent herewith, be, and the same are hereby repealed; except so far as any penalties have been heretofore incurred by reason of non-compliance by any firm, corporation or person with the provision of any such ordinance for which purpose said ordinance shall remain in force.

Approved the thirtieth day of March, A. D. 1883.

SAMUEL G. KING,
Mayor of the City of Philadelphia.

28 (Endorsed.)

Served the Atlantic and Pacific Telegraph Company by giving January 4, 1892 a true and attested copy of the within writ to W. B. Gill superintendent of said company and making known to him the contents thereof.

So answers

PETER SAYBOLT, *Deputy Sheriff.*
HORATIO P. CONNELL, *Sheriff.*

29 THE CITY OF PHILADELPHIA *vs.* ATLANTIC AND PACIFIC TELEGRAPH COMPANY. } C. P. No. 4, Dec. Term, 1891. No. 319.

SIR: Enter my appearance for the defendant in the above case.

READ & PETTIT,
Attorneys for Defendant.

To proth'y C. P.

(Endorsed:) 319 Dec. term 1891 C. P. No. 4 City of Philadelphia *vs.* Atlantic & Pacific Telegraph Company. Order to enter appearance Filed 21 Jan. 1892 J. Briggs pro proth'y Read & Pettit.

30 CITY OF PHILADELPHIA *vs.* ATLANTIC & PACIFIC TELEGRAPH CO. } C. P. No. 4, December Term, 1891. No. 319.

And now, to wit, this — day of —— A. D. 1892, it appearing to the court that the defendant in the above cause is a corporation of the State of New York and is a citizen thereof, and that the controversy involves a sum exceeding the sum of two thousand dollars, exclusive of interest and costs, and that the said cause is removable unto the circuit court of the United States for the eastern district of Pennsylvania, it is ordered and decreed that the said defendant be, and hereby is, authorized and permitted to remove the said cause from the court of common pleas of the city and county of Philadelphia, to the circuit court of the United States for the eastern district of Pennsylvania, as in its petition prayed.

(Endorsed:) 319 Dec. T. 1891 C. P. No. 4 City *v.* Atlantic & Pacific Tel. Co. Order for removal Read & Pettit Filed Feb'y 27, 1892 C. H. White.

31 In the Court of Common Pleas No. 4 for the County of Philadelphia, of December Term, 1891.

CITY OF PHILADELPHIA
vs.
THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY. } No. 319.

To the honorable the judges of the said court:

The petition of the Atlantic and Pacific Telegraph Company respectfully represents:

Your petitioner is a corporation duly organized under the laws of the State of New York and a citizen thereof; said corporation was so organized for telegraph purposes and owns controls and operates lines of telegraph in various States of the United States for the communication of intelligence by electricity, including lines of telegraph within the State of Pennsylvania, and including the telegraph poles and wires within the city of Philadelphia, to recover for the license fees upon which the above suit is brought.

The matter in dispute in the above cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, to wit, the sum of three thousand seven hundred and fifteen dollars as will more fully and at large appear by reference to the statement filed therein.

Your petitioner desires to remove the said cause from this
32 court to the circuit court of the United States for the eastern district of Pennsylvania, being the district within which the said city of Philadelphia is situate, and offers herewith its bond with good and sufficient security, to wit, one in the sum of five hundred dollars, conditioned as provided in the act of Congress in such case made and provided, and therefore prays your honorable court for an order allowing it to remove the said cause and to proceed no further in said suit.

And it will ever pray &c.

THE ATLANTIC & PACIFIC
TELEGRAPH CO.,
By THOS. T. ECKERT,
Vice-President.

[SEAL.] A. R. BREWER, *Secretary.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Thomas T. Eckert being duly sworn according to law deposes and says that he is a vice-president of The Atlantic and Pacific Telegraph Company, the petitioner above named, and that the facts set forth in the foregoing petition are true.

(S'g'd) THOS. T. ECKERT.

Sworn to and subscribed before me this 16th day of January A. D. 1892.

GEO. H. FEAROUS,
[SEAL.] *Notary Public, New York County.*

33 Know all men by these presents, that the Atlantic and Pacific Telegraph Company as principal and Wm. B. Gill as surety are held and firmly bound unto the City of Philadelphia in the sum of five hundred dollars, lawful money of the United States, to be paid to the said City of Philadelphia, its certain attorney successors or assigns, to which payment well and truly to be made we do hereby bind ourselves our successors, heirs, executors and administrators jointly and firmly by these presents.

Sealed with our seals, dated the eighteenth day of January A. D. 1892.

The condition of this obligation is such that,

Whereas, the said City of Philadelphia has brought a certain suit in the court of common pleas No. 4 for the county of Philadelphia, as of December term 1891, No. 319, against the said Atlantic and Pacific Telegraph Company.

And whereas the said Atlantic and Pacific Telegraph Company desires to remove the said cause from the said court of common pleas No. 4 of the county of Philadelphia to the circuit court of the United States for the eastern district of Pennsylvania and has filed its petition in said court of common pleas for that purpose.

Now, therefore, if the said Atlantic and Pacific Telegraph Company shall enter in the said circuit court of the United States for the eastern district of Pennsylvania on the first day of its
34 next session a copy of the record in said suit and pay all costs that may be awarded by said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to be and remain in full force and virtue.

THE ATLANTIC AND PACIFIC TELEGRAPH CO.,
By THOS. T. ECKERT, *Vice-President.*

Sealed and delivered in the presence of
[SEAL.] A. R. BRUNER, *Sec'y.*

CITY AND COUNTY OF PHILADELPHIA, *ss:*

William B. Gill being duly sworn according to law deposes and says that he is the surety in the foregoing bond and that he is worth at least five hundred dollars over and above his just debts and liabilities and that he is possessed of property within the county of Philadelphia liable to execution to the value of five hundred dollars, over and above the amount exempt by law.

(S'g'd) WM. B. GILL.

Sworn to and subscribed before me this 18th day of January A. D. 1892.

H. V. SICKEL,
Notary Public.

[SEAL.]

35 (Endorsed:) 319 Dec. T. 1891 C. P. No. 4 The City of Philadelphia *vs.* The Atlantic & Pacific Telegraph Co. Petition for removal to U. S. circuit court. Read & Pettit. Filed Jan. 18, 1892.

36 COMMONWEALTH OF PENNSYLVANIA, } *ss:*
Philadelphia County, }

I, Wm. B. Mann, prothonotary of the court of common [SEAL.] pleas, No. 4 in and for said county, certify that the foregoing is a full and correct copy of the whole record of the case herein stated, wherein City of Philadelphia — plaintiff and Atlantic & Pacific Telegraph Company defendant, as the same remains of record before the said court, at No. 319 of December term, A. D. 1891.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, the 2d day of March A. D. 1892.

F. H. SMITH,
Pro Prothonotary.

(Endorsed:) 340 Oct. sess. 1891. C. C. U. S. City of Philadelphia *vs.* Atlantic & Pacific Telegraph Co. Exemplification of record from court of common pleas No. 4 of Philadelphia county. Read & Pettit. Filed Mar. 3, 1892 Samuel Bell, clerk.

37 THE CITY OF PHILADELPHIA *vs.* THE ATLANTIC AND PACIFIC TELEGRAPH CO. } C. P. No. 4, December T., 1891. No. 319.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

W. B. Gill being duly sworn according to law deposes and says that he is the superintendent of The Atlantic and Pacific Telegraph Company, defendant in the above cause, and that the said defendant has a just full and true defense to the whole of the plaintiff's claim of the following nature and character, to wit:

As to the sum of fifty-seven and 50/100 dollars claimed for attachments to city poles that the defendant has paid the plaintiff the same in cash.

That the said defendant has already paid unto the Commonwealth of Pennsylvania all taxes upon the value of said poles and wires as included in and represented by its capital stock and upon the gross receipts derived from the use thereof, as provided by the laws of said State and which have been assessed thereon.

And deponent further says that the said defendant is a corpora-

tion duly organized under the laws of the State of New York with power to construct, maintain and operate lines of telegraph in and through the various States and Territories of the United States and that it did on or about the 19th day of March 1897 duly accept the provisions of the act of Congress approved the 24th day of
38 July 1866 entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes" and on the 19th day of March 1867 did file its written acceptance of the restrictions and obligations required by said act of Congress with the Postmaster General of the United States, and that it did by virtue and under the authority thereof at the time for which the said license fees are sought to be recovered, to wit, from the first day of January A. D. 1885 hitherto and still doth lawfully own, control, maintain and operate lines of telegraph within the State of Pennsylvania, of which the said wires and poles erected and maintained within the limits of the city of Philadelphia aforesaid and the license fees upon which are sought to be recovered in the above cause form a part, connecting with and forming parts of lines of telegraph extending between various States of the United States and the Territories thereof for the communication of intelligence by electricity.

And deponent avers that said poles and wires were during all the time aforesaid used and operated for the transmission, by electricity, of intelligence to and from the said city of Philadelphia from and to other cities and States without the State of Pennsylvania and situate within the other States and Territories of the United States, which said communication of intelligence is commerce between the States within the meaning of the Constitution of the United
39 States, and that the said license fees so sought to be imposed by the said ordinances of the city of Philadelphia are so imposed by it for the purpose of producing, and would produce, revenue to the said city of Philadelphia over and above the cost of regulating and supervising the said telegraph poles and wires mentioned and the cost of issuing licenses therefor and that the said fees and charges are unreasonable and more than ten times the cost of regulating and supervising the said poles and wires and issuing licenses therefor and are, therefore, a tax upon the said poles and wires upon which they are so sought to be imposed and that the said ordinances are void and of no effect because the said city of Philadelphia has no authority to impose a tax thereon and because the same are in conflict with that provision of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several States.

All which he avers and expects to be able to prove upon the trial of the said cause.

W. B. GILL.

Sworn to and subscribed before me this 23rd day of February A. D. 1898.

[SEAL.] ALFRED J. WILKINSON,
Notary Public.

(Endorsed:) 340 Oct. sess. 1891 C. C. U. S. City of Philadelphia vs. Atlantic & Pacific Tel. Co. Affidavit of defense. Filed Mar. 3, 1892 Samuel Bell, clerk. Read & Pettit.

40 CITY OF PHILADELPHIA *vs.* ATLANTIC & PACIFIC TELEG. CO. } U. S. C. C., Oct., '91. 340.

Enter my appearance for the pl'ff.

JOHN L. KINSEY, *City Sol'r*,
Per E. SPENCER MILLER.

(Endorsed:) Atlantic and Pacific Tel. Co. U. S. C. C. Oct. '91 340 Præcipe for appearance Kinsey Filed Mar. 5, 1897, Samuel Bell, clerk.

41 CITY OF PHILADELPHIA *vs.* ATLANTIC & PACIFIC TEL. CO. } C. C. U. S., Oct. Sess., 1891. No. 340.

The defendant above named pleads non-assumpsit, payment, with leave, etc.

READ & PETTIT,
B.,
Att'ys for Defendant.

To clerk U. S. C. C.

(Endorsed:) 340 Oct. sess. 1891 C. C. U. S. City of Philada. v. Atlantic & Pacific Tel. Co. Pleas Read & Pettit Filed Mar. 11, 1897, Samuel Bell, clerk.

42 U. S. Circuit Court, October Sessions, 1892.

CITY OF PHILADELPHIA *vs.* ATLANTIC & PACIFIC TELEGRAPH COMPANY. } No. —.

Statement of Claim.

The City of Philadelphia files this its statement against the Atlantic and Pacific Telegraph Company for a certain cause of action which it has against the said company, as follows:

The defendant company is a corporation organized under the laws of the State of New York. It conducts the business of delivering messages by electrical current. For the purpose of its said business it maintained telegraph poles and wires in the city of Philadelphia throughout the years respectively named, according to the particular statement hereinafter set forth. It also maintained and used wires on city poles and made attachments for the said wires thereon.

On the 6th day of January, 1881, the councils of the city of Philadelphia, with the approval of the mayor of the said city, shown subsequently by his official signature to the bill, enacted an ordinance

imposing a charge upon every telegraph company maintaining poles in the city of Philadelphia, *in* one dollar per annum on each pole.

A true copy of the said ordinance is attached hereto as
43 "Exhibit A."

On the 30th day of March, 1883, the said city councils, with like approval of the mayor of said city, enacted a certain ordinance whereby a charge *in* two dollars and fifty cents ($2.50) per mile of wire was imposed upon every telegraph company doing business in the city of Philadelphia, for all wires maintained upon poles therein. A true copy of said ordinance is attached hereto as "Exhibit B."

The number of poles maintained by the said company, and of miles of wire maintained by it in the respective years, were as follows:

Year.	Poles maintained.	Miles of wire.	
1885	312	134 at $2.50 ...	$335.00
1886	312	144 " " ...	360.00
1887	312	147 " " ...	367.50
1888	303	145 " " ...	362.50
1889	303	145 " " ...	362.50
1890	293	14 " " ...	35.00
1891	293	15 " " ...	37.50
	2128		$1860.00
			2128.00
			$3988.00

Wherefore, said company was indebted to the city of Phila-
44 delphia on the first days of the years 1885, 1886, 1887, 1888, 1889, 1890, and 1891, and on the first Mondays of the said years, in the sums hereinbefore stated respectively. Said defendant company neglected and refused to pay same, though frequently asked so to do by the city of Philadelphia. Wherefore, the said company is indebted to the city of Philadelphia in the total sum of $3988.00, with interest on the respective portions thereof from said respective dates at which the same was payable and of right should have been paid.

Wherefore this plaintiff brings this its suit.

CHAS. F. WARWICK,
Mayor of Philadelphia.

STATE OF PENNSYLVANIA, }
City & County of Phila., } ss:

Charles F. Warwick, being duly sworn according to law says, that he is mayor of the city of Philadelphia, and that the facts set forth in the above statement are true.

CHAS. F. WARWICK.

Sworn and subscribed before me this seventh day of March, A. D. 1898.

HIRAM HORTER, JR.,
[SEAL.] *Notary Public.*

45 EXHIBIT A.

An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the city of Philadelphia.

Whereas, great inconvenience and annoyance have been occasioned to property-owners by the placing of telegraph poles in front of their premises.

And whereas, the lives and property of citizens travelling upon the public streets and highways have been imperilled by the erection and maintenance of inadequate or unsound telegraph poles thereon, so that it has become necessary to establish a system for the proper inspection of such poles, and for the regulation of the erection and maintenance thereof; therefore,

SECTION 1. The select and common councils of the city of Philadelphia do ordain, That whenever permission shall have been granted by councils to any corporation, firm, or individual, to construct a line of telegraph which requires the erection of poles in or upon any of the public streets or highways within the corporate limits of the city of Philadelphia, it shall be the duty of such corporation, firm, or individual, before any pole shall be erected, to submit to the superintendent of the police and fire-alarm telegraph a
46 written application specifying the number and size of poles intended to be erected, and designating the places where the same are intended to be erected, and if no objection be made hereto it shall be the duty of the said superintendent of the police and fire-alarm telegraph to issue a license to the said applicant for the erection of the specified poles at the designated places of insertion. In case of objections being made to the whole or any part of such application, it shall be the duty of the superintendent of the police and fire-alarm telegraph to hear the same and to grant the license either in accordance with the application or with such conditions and modifications to secure the purposes of this ordinance as the case may require.

No pole shall be newly erected without the license of the superintendent of the police and fire-alarm telegraph shall have been previously obtained therefor as provided in this section, and for every license so granted there shall be paid to the city treasurer, for the use of the city, the sum of five (5) dollars per pole.

SECT. 2. It shall be the duty of the superintendent of the police and fire-alarm telegraph to cause a thorough and careful inspection to be made, at least once in every year, of all telegraph or telephone poles erected within the corporate limits of the city of Philadelphia, and if any pole shall be found defective or dangerous from any cause, he shall notify the corporation, firm or individual
47 owning such pole, who shall forthwith replace the same with a sound pole; and if the said owner neglect or refuse to replace such defective pole within forty-eight hours after receiving such notification, he or they shall be liable to a fine of five (5) dollars for each and every day during which said neglect or refusal shall continue, to be collected as debts of like amount are now by law recoverable.

SECT. 3. All telegraph poles now erected, or hereafter to be erected, in the city of Philadelphia, which are or shall be owned by any corporation, firm, or individual, shall be designated by the names or initials of such owner, and each of said poles shall bear a distinctive number, together with the names or initials and number shall be legibly marked with oil paint upon the poles so designated. It shall be the duty of every such owner or owners, on or before the first Monday of February, and annually thereafter on the first Monday of January in each and every year, to make application to the superintendent of the police and fire-alarm telegraph for a license to maintain the poles theretofore erected for the ensuing year, specifying the poles so to be maintained by their designation, as provided for in this section, and the superintendent of the police and fire-alarm telegraph shall issue a license to such applicant which
48 shall authorize the maintenance of the poles designated in the application, only for the period of one year from the first day of January next ensuing the date of said application, and no longer; and the charge for issuing such license shall be the sum of one (1) dollar for each and every pole authorized to be maintained thereby, and shall be paid to the city treasurer for the use of the said city.

SECT. 4. On and after the first day of January, A. D., 1881, no telegraph pole shall be maintained within the corporate limits of the city of Philadelphia without an annual license for the maintenance thereof shall have been previously granted for the same, in accordance with the provisions of section 3 of this ordinance; any privilege heretofore granted by resolution or ordinance for the erection and maintenance of poles for telegraphic or telephonic purposes be, and the same are, hereby repealed. Any person or persons violating the provisions of this section shall be liable to a fine of fifty (50) dollars for each and every telegraph pole so maintained without license, to be recovered as debts of like amount are now by law recoverable.

SECT. 5. Upon complying with the provisions and requirements of this ordinance the privileges heretofore granted to such individuals, companies, or corporations by resolution or ordinance shall not be in any way affected. The councils of the city of Phila-
49 delphia, however, reserves the right to revoke by ordinance

any of the privileges mentioned in this or any other ordinance or resolution.

JOS. L. CAVEN,
President of Common Council.

Attest: JOSEPH H. PAIST,
Clerk of Select Council.

JOHN McCULLOUGH,
President pro Tem. of Select Council.

Approved this sixth day of January, anno Domini one thousand eight hundred and eighty-one. (A. D. 1881).

WILLIAM S. STOKLEY,
Mayor of Philadelphia.

50 EXHIBIT B.

An ordinance to regulate the introduction and use of underground conduits, wires and cables for electrical conductors in the streets of the city of Philadelphia, and to provide for charges for underground, overground or overhead wires, and to repeal an ordinance entitled "An ordinance to regulate the introduction and use of underground conduits, electrical cables and wires for electrical conductors, in the streets of the city of Philadelphia, and to provide for charges for overground wires," approved June 21, 1882.

SECTION 1. The select and common councils of the city of Philadelphia do ordain, That all corporations, firms and persons to whom permission has heretofore, or which may hereafter be granted, for running or laying underground conduits, tubes or pipes for electrical conductors, or cables, or wires, or all corporations, firms and persons to whom permission has heretofore, or which may hereafter be granted, for the erection of poles, fixtures, cables, wires and conductors in or over the streets or housetops in the city of Philadelphia, shall conform to the requirements of this general ordinance.

SECT. 2. That no street, alley, lane or road in the city of Philadelphia shall be broken or occupied by any corporation, firm or person, for the purpose of laying down conduits, tubes or
51 pipes for electrical conductors, cables or wires, unless authority by ordinance be first obtained. That during the construction or laying of said underground conduits, tubes, pipes, conductors, cables and wires, no street, alley, lane, or road shall be opened, or the paving broken into, for a greater distance than five hundred (500) feet at any one time, and that no section of five hundred (500) feet shall be kept open for a longer period than five (5) days; and said opening or trench shall not be of a greater width than two (2) feet, and as the work progresses the paving shall be promptly relaid, and the street, alley, lane or road put in good condition.

SECT. 3. Prior to making an opening in any street, alley, lane or road for the laying of conduits, tubes, or pipes for electrical conductors, cables or wires, the corporation, firm or person desiring to

lay the same shall make application in writing to the department of police and fire-alarm telegraph, and shall file plans and specifications with said department, showing the location, route and length of the proposed conduits, pipes or tubes, and on the issuance of a certificate to the effect that the route or routes and plans and specifications meet with the approval of the superintendent of the police and fire-alarm telegraph, the chief engineer and surveyor, and the chief commissioner of highways; thereupon the chief commis-
52 sioner of highways shall have authority to issue the necessary permit, on compliance with the provisions of section 9 of this ordinance, for the opening of such street, alley, lane or road, as set forth in the applications and plans and specifications *as set forth in the applications and plans* as are proposed to be occupied. In addition to filing the plans and specifications as hereinbefore provided, duplicates of the same shall also be filed in the department of highways and surveys, and neglect on the part of the applicant to file such papers on the opening of any street, alley, lane or road, without a permit having been first obtained, shall forfeit the right of any corporation, firm or person, to use or occupy any street, lane, alley or road. The work of laying underground conduits, tubes, pipes, electrical conductors, cables and wires shall be under the direction and to the satisfaction of the superintendent of the police and fire-alarm telegraph, who at all times shall have free and unobstructed access to the conduits, tubes, pipes, electrical conductors or cables, for the purpose of inspecting the same, or making connections therewith for wires or conductors in use or to be used by the city.

SECT. 4. That all corporations, firms or persons occupying any street, alley, lane or road, with underground conduits, tubes, pipes, cables, electrical conductors or wires, shall be liable for all damages to gas and water mains, services and sewers, connections to sewers, and also for any damages caused by the opening of trenches,
53 or condition of the streets, alleys, lanes or roads resulting from the laying of the conduits, tubes, pipes, electrical conductors, cables or wires, or making connection for which the city of Philadelphia would otherwise be liable; and the bond provided in section 9 of this ordinance shall contain a provision to that effect.

SECT. 5. That when the city of Philadelphia may desire to use or occupy any of the wires or conductors in any of the conduits, tubes, pipes or cables, for police, fire-alarm or other municipal purposes, the corporation, firm or person, to whom privileges have heretofore, or shall hereafter be granted, for the laying of underground conduits, tubes, pipes, electrical conductors, cables or wires, shall furnish the superintendent of the police and fire-alarm telegraph with one and not more than three conductors or wires, upon thirty days' notice to any such corporation, firm or person, free of any cost to said city. The superintendent of police and fire-alarm telegraph to have the whole and absolute control of such electrical conductors or wires as he shall elect to use for the purpose named.

SECT. 6. That all corporations, firms or persons having telegraph,

telephone, or electric lighting wires, electrical conductors, or cables on telegraph poles belonging in whole or in part to the city of Philadelphia, or on any other poles or fixtures, or over housetops, or in any way suspended above ground or placed underground
54 shall, in writing, on or before the first Monday of April, eighteen hundred and eighty-three (1883), and annually thereafter, on or before the second Monday of December, certify under oath to the superintendent of the police and fire-alarm telegraph the actual number of wires, location, and the miles of wire and electrical conductors, whether suspended singly or in cable, tubes, pipes or conduits, above ground or underground, owned, leased or controlled by them in the city of Philadelphia. Failure to make such a return within the time provided for in this ordinance shall subject the offenders to a penalty of fifty (50) dollars per day until such return is made.

SECT. 7. That on all conductors or wires suspended above ground, excepting such as are used or owned by the city of Philadelphia an annual payment of five (5) dollars per mile or any part thereof in length of conductors for electrical lighting purposes for each and every wire or conductor, and of two (2) dollars and fifty (50) cents per mile or part thereof in length of wire or conductors for each and every wire or conductor used or to be used for telegraphic, telephonic, or other purposes; and on all wires or conductors placed underground excepting such as are used or owned by the city of Philadelphia, an annual payment of two (2) dollars and fifty (50) cents per mile or any part thereof in length for conductors or wires for electrical lighting purposes for each and every wire or conductor, and one (1) dollar per mile or part thereof in length,
55 of conductors or wires for each and every wire or conductor used or to be used for telegraphic, telephonic, or other purpose, shall be paid to the city treasurer on or before the first Monday of May, 1883, and annually thereafter, in advance on or before the first Monday of January. Failure to make payment as required within the time herein specified shall subject the offenders to a penalty of fifty (50) dollars per day for each and every day thereafter until payment is made. All penalties provided for in this ordinance shall be recovered as like penalties are now by law recoverable.

SECT. 8. That an annual license charge of five (5) cents per running foot on all underground conduits, tubes or pipes for electrical conductors not exceeding twelve (12) inches in diameter, be made, and on all other conduits, tubes or pipes for like purpose, exceeding twelve (12) inches in diameter, an annual license charge of ten (10) cents per running foot be made payable to the city of Philadelphia, at the same time and under the same provisions as are provided in section 7, for the payment of charges for conductors and wires.

SECT. 9. That any corporation, firm or person shall, before erecting or laying any conduits, tubes, pipes, cables, electrical conductors or wires, give a bond and warrant of attorney, with good and sufficient security in real estate, to be filed of record, or Government, State or city bonds, to the city of Philadelphia, in the sum of twenty

thousand (20,000) dollars, conditioned, that they shall properly relay and pave all openings made by it or them, and
56 thereafter keep in repair the paving over said openings, and that they will make return and pay the annual license charge for underground conduits, tubes, and pipes, including all the electrical conductors and wires contained in said conduits, tubes, pipes or cables, as well as the annual license charge for all overhead wires, cables or conductors, as hereinbefore provided, and will comply with the provisions of this ordinance and of all other ordinances now in force or hereafter to be passed, regulating the introduction, use, maintenance, taxation or license charges of telegraph, telephone, electrical conduits, conductors, wires or cables in the city of Philadelphia. The said bond shall be approved by and filed with the city solicitor, and a certificate of such approval and filing shall be furnished to the chief commissioner of highways before he shall issue a permit for the opening of any street, alley, lane or road, and the corporation, firm or person shall also pay to the city treasurer the sum of fifty (50) dollars, for the publication of the ordinance authorizing it or them to lay such conduit, tube, pipe, conductor, wire or cable.

SECT. 10. That if any underground conduit company or individual should at any time dispose of any of the franchises granted by any ordinance of councils, or consolidate with any other company, the company so selling or consolidating shall forfeit all
57 rights and privileges granted by such ordinance, and shall be liable to, and shall pay to, the city of Philadelphia a penalty of twenty-five thousand (25,000) dollars, to be sued out and collected by the city solicitor; the company or individuals buying from or consolidating with aforesaid individuals or companies shall be liable and shall pay to the city of Philadelphia the sum of twenty-five thousand (25,000) dollars, to be sued out and collected as hereinbefore prescribed.

SECT. 11. That any corporation, firm or person erecting or laying any conduits, tubes, pipes, cables, electrical conductors or wires, shall erect or lay such conduits, tubes, pipes, cables, electrical conductors or wires clear of all other pipes.

SECT. 12. That the ordinance entitled "An ordinance to regulate the introduction and use of underground conduits, electric cables and wires for electrical conductors in the streets of the city of Philadelphia, and to provide for charges for overground wires," approved June 21, 1882, as well as all other ordinances or parts of ordinances inconsistent herewith, be, and the same are, hereby repealed; except so far as any penalties have been heretofore incurred by reason of non-compliance by any firm, corporation or person with the
58 provision of any such ordinance for which purpose said ordinance shall remain in force.

Approved the thirtieth day of March, A. D. 1883.

SAMUEL G. KING,
Mayor of the City of Philadelphia.

(Endorsed:) U. S. C. C. Oct. '91 340. Phila. *vs.* Atlantic & Pacific Tel. Co. Rule to show cause why the statement filed should

not be amended according to this form by substitution hereof. I accept service of above rule for hearing. March —, 1898. Read & Pettit B. March 8, 1898. Upon the understanding that the amendment is not objected to the rule is both granted & made absolute as of this date. Geo. M. Dallas, J. E. Spencer Miller John L. Kinsey. Filed Mar. 16, 1898 Samuel Bell, clerk, per G. B. Jr.

59 U. S. Circuit Court, October Sessions, 1891.

CITY OF PHILADELPHIA
vs.
ATLANTIC AND PACIFIC TELEGRAPH COMPANY. } No. 340.

And now, to wit, April 16th 1901, by leave of the court, defendant pleads as to so much of the plaintiff's claim in the above-entitled cause as includes taxes on poles and wires for the year 1885 that the same is barred by the statute of limitations.

READ & PETTIT,
Att'ys for Defendant.

(Endorsed:) 340 October sess. 1891 U. S. C. C. City of Philadelphia *v.* Atlantic & Pacific Tel. Co. Plea. Read & Pettit, for def't. Filed April 17, 1901. Samuel Bell, clerk H. R.

60 And afterwards to wit on the 17th day of April, 1901, a jury being called come to wit, as follows:—

W. G. Heilman	Amos G. Chambers
Morris Trupp	James Tully
John R. Wiggins	Peter W. Hofer
Chas. E. Rauch	John B. Kendig
Wm. Trimble	Harry G. Lenhart
John Loitz	Francis S. Pleasanton

who were duly sworn &c. to try the issue joined &c.

And afterwards to wit on the 18th day of April 1901, the jurors aforesaid upon their oaths and affirmations aforesaid respectively do say that they find for plaintiff and assess the damages at seven thousand two hundred and fifty-three $\frac{92}{100}$ dollars.

61 In the Circuit Court of the United States for the Eastern District of Pennsylvania, October Sessions, 1891.

CITY OF PHILADELPHIA, Plaintiff,
vs.
ATLANTIC AND PACIFIC TELEGRAPH COMPANY, Defendant. } No. 340.

Be it remembered, that in the said October sessions A. D. 1891 came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of assumpsit, &c.; in which the said plaintiff declared (*pro ut* narr.,) and the said defendant pleaded (*pro ut* pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the district aforesaid, before the Honorable John B. McPherson, justice of the said court, at Philadelphia, on Wednesday and Thursday, the 17th and 18th days of April, A. D. 1901, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly empanelled (*pro ut* list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid im-
62 panelled to try the said issue being so called, came and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiff and defendant offered evidence to maintain their respective issues as follows, and the learned court did charge the jury as follows:

63 U. S. C. C. of Pa., Oct. Term, 1891.

CITY OF PHILADELPHIA
vs.
ATLANTIC AND PACIFIC TEL. CO. } 340.

Before McPherson, J., and a jury.

PHILADELPHIA, PA., WEDNESDAY, *April* 17, 1901.

Appearances.

E. S. Miller, Esq., for plaintiff.
Messrs. Read and Pettit, for defendant.
(Mr. Pettit, counsel for defendant, files a plea of the statute of limitations, as regards the tax for the year 1885.)
Mr. MILLER: I offer in evidence the ordinance of January 6th, 1881, page 1, of the Book of Ordinances for that year *Pro ut* same.

(*Copy of Ordinance, January 6th*, 1881.)

An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the city of Philadelphia.

Whereas, great inconvenience and annoyance have been occasioned to property-owners by the placing of telegraph poles
64 in front of their premises.
And whereas the lives and property of citizens travelling upon the public streets and highways have been imperilled by the erection and maintenance of inadequate or unsound telegraph poles thereon, so that it has become necessary to establish a system for the proper inspection of such poles, and for the regulation of the erection and maintenance thereof; therefore,
SECTION 1. The select and common councils of the city of Philadelphia do ordain, That whenever permission shall have been granted by councils to any corporation, firm or individual, to construct a line of telegraph which requires the erection of poles in or

upon any of the public streets or highways within the corporate limits of the city of Philadelphia, it shall be the duty of such corporation, firm, or individual, before any pole shall be erected, to submit to the superintendent of the police and fire-alarm telegraph a written application specifying the number and size of poles intended to be erected, and designating the places where the same are intended to be inserted, and if no objection be made hereto it shall be the duty of the said superintendent of the police and fire-alarm telegraph to issue a license to the said applicant for the erection of the specified poles at the designated places of insertion. In case of objections being made to the whole or any part of such application, it shall be the duty of the superintendent of police and fire-alarm telegraph to hear the same and to grant the license either in accordance with the application or with such conditions and modifications to secure the purposes of this ordinance as the case may require.

No pole shall be newly erected without the license of the superintendent of the police and fire-alarm telegraph shall have been previously obtained therefor as provided in this section, and for every license so granted there shall be paid to the city treasurer, for the use of the city, the sum of five (5) dollars per pole.

SECT. 2. It shall be the duty of the superintendent of the police and fire-alarm telegraph to cause a thorough and careful inspection to be made, at least once in every year, of all telegraph or telephone poles erected within the corporate limits of the city of Philadelphia, and if any pole shall be found defective or dangerous from any cause, he shall notify the corporation, firm or individual owning such pole, who shall forthwith replace the same with a sound pole; and if the said owner neglect or refuse to replace such defective pole within forty-eight hours after receiving such notification, he or they shall be liable to a fine of five (5) dollars for each and every day during which said neglect or refusal shall continue, to be collected as debts of like amount are now made by law recoverable.

SECT. 3. All telegraph poles now erected, or hereafter to be erected, in the city of Philadelphia, which are or shall be owned by any corporation, firm, or individual, shall be designated by the name or initials of such owner, and each of said poles shall bear a distinctive number, together with the names or initials, and number shall be legibly marked with oil paint upon the poles so designated. It shall be the duty of every such owner or owners, on or before the first Monday of February and annually thereafter on the first Monday of January, in each and every year, to make application to the superintendent of the police and fire-alarm telegraph for a license to maintain the poles theretofore erected for the ensuing year, specifying the poles so to be maintained by their designation, as provided for in this section, and the superintendent of the police and fire-alarm telegraph shall issue a license to such applicant which shall authorize the maintenance of the poles designated in the application, only for the period of one year from the first day of January next ensuing the date of said application, and no longer; and the charge for issuing such license

shall be the sum of one (1) dollar for each and every pole authorized to be maintained thereby, and shall be paid to the city treasurer for the use of the said city.

SECT. 4. On and after the first day of January, A. D. 1881, no telegraph pole shall be maintained within the corporate limits of the city of Philadelphia without an annual license for the maintenance thereof shall have been previously granted for the same, in accordance with the provisions of section 3 of this ordinance; any privilege heretofore granted by resolution or ordinance for
67 the erection and maintenance of poles for telegraphic or telephonic purposes be, and the same are, hereby repealed. Any person or persons violating the provisions of this section shall be liable to a fine of fifty (5–) dollars for each and every telegraph pole so maintained without license, to be recovered as debts of like amount are now by law recoverable.

SECT. 5. Upon complying with the provisions and requirements of this ordinance the privileges heretofore granted to such individuals, companies, or corporations by resolution or ordinance shall not be in any way affected. The councils of the city of Philadelphia, however, reserves the right to revoke by ordinance any of the privileges mentioned in this or any other ordinance or resolution.

JOS. L. CAVEN,
Pres't of Common Council.

Attest: JOSEPH H. PAIST,
Clerk of Select Council.

JOHN McCULLOUGH,
President pro Tem. of Select Council.

Approved this sixth day of January, anno Domini one thousand eight hundred and eighty-one (A. D. 1881).

WILLIAM S. STOKLEY,
Mayor of Philadelphia.

68 Also the ordinance of March 30th, 1883, page 68, of the Book of Ordinances for that year *Pro ut* same.

(*Copy of Ordinance, March 30th*, 1883.)

An ordinance to regulate the introduction and use of underground conduits, wires, and cables for electrical conductors in the streets of the city of Philadelphia, and to provide for charges for underground, overground or overhead wires, and to repeal an ordinance entitled "An ordinance to regulate the introduction and use of underground conduits, electrical cables, and wires for electrical conductors in the streets of the city of Philadelphia, and to provide for charges for overground wires," approved June 21, 1882.

SECTION 1. The select and common councils of the city of Philadelphia do ordain, That all corporations, firms and persons to whom permission has heretofore, or which may hereafter be granted, for running or laying underground conduits, tubes or pipes for electri-

cal conductors, or cables, or wires, or all corporations, firms and persons to whom permission has heretofore, or which may hereafter be granted, for the erection of poles, fixtures, cables, wires and conductors in or over the streets or housetops in the city of Philadephia, shall conform to the requirements of this general ordinance.

SECT. 2. That no street, alley, lane or road in the city of Philadelphia shall be broken or occupied by any corporation, firm
69 or person, for the purpose of laying down conduits, tubes or pipes for electrical conductors, cables or wires, unless authority by ordinance be first obtained. That during the construction or laying of said underground conduits, tubes, pipes, conductors, cables and wires, no street, alley, lane or road shall be opened, or the paving broken into, for a greater distance than five hundred (500) feet at any one time, and that no section of five hundred (500) feet shall be kept open for a longer peried than five (5) days and said opening or trench shall not be of a greater width than two (2) feet, and as the work progresses the paving shall be promptly relaid, and the street, alley, lane or road put in good condition.

SECT. 3. Prior to making an opening in any street, alley, lane or road for the laying of conduits, tubes or pipes for electrical conductors, cables or wires, the corporation, firm or persons desiring to lay the same shall make application in writing to the department of police and fire-alarm telegraph, and shall file plans and specifications with said department, showing the location, route and length of the proposed conduits, pipes or tubes, and on the issuance of a certificate to the effect that the route or routes and plans and specifications meet with the approval of the superintendent of the police and fire-alarm telegraph, the chief engineer and surveyor, and the chief commissioner of highways shall have authority to issue the necessary permit, on compliance with the provisions of sec-
70 tion 9 of this ordinance, for the opening of such street, alley, lane or road, as set forth in the applications and plans, as are proposed to be occupied. In addition to filing the plans and specifications as hereinbefore provided, duplicates of the same shall also be filed in the department of highways and surveys, and neglect on the part of the applicant to file such papers on the opening of any street, alley, lane or road, without a permit having been first obtained, shall forfeit the right of any corporation, firm or person, to use or occupy any street, alley, lane or road. The work of laying underground conduits, tubes, pipes, electrical conductors, cables and wires shall be under the direction and to the satisfaction of the superintendent of the police and fire-alarm telegraph, who at all times shall have free and unobstructed access to the conduits, tubes, pipes, electrical conductors or cables, for the purpose of inspecting the same, or making connections therewith for wires or conductors in use or to be used by the city.

SECT. 4. That all corporations, firms or persons occupying any street, alley, lane or road with underground conduits, tubes, pipes, cables, electrical conductors or wires, shall be liable for all damages to gas and water mains, services and sewers, connections to sewers, and also for any damages caused by the opening of trenches, or

conditions of the streets, alleys, lanes or roads resulting from the laying of the conduits, tubes, pipes, electrical conductors, cables or wires, or making connection for which the city of Philade-
71 phia would otherwise be liable and the bond provided in section 9 of this ordinance shall contain a provision to that effect.

SECT. 5. That when the city of Philadelphia may desire to use or occupy any of the wires or conductors in any of the conduits, tubes, pipes or cables, for police, fire-alarm or other municipal purposes, the corporation, firm or person, to whom the privileges have heretofore, or shall hereafter be granted, for the laying of underground conduits, tubes, pipes, electrical conductors, cables or wires, shall furnish the superintendent of the police and fire-alarm telegraph with one and not more than three conductors or wires, upon thirty days' notice to any such corporation, firm or person, free of any cost to said city. The superintendent of police and fire-alarm telegraph to have the whole and absolute control of such electrical conductors or wires as he shall elect to use for the purpose named.

SECT. 6. That all corporations, firms or persons having telegraph, telephone, or electric lighting wires, electrical conductors, or cables on telegraph poles belonging in whole or in part to the city of Philadelphia, or on any other poles or fixtures, or over housetops, or in any way suspended above ground or placed under ground, shall, in writing, on or before the first Monday of April, eighteen hundred and eighty-three (1883), and annually thereafter, on or before the second Monday of December, certify under oath to the superintendent of the police and fire-alarm telegraph the actual number
72 of wires, location, and the miles of wire and electrical conductors, whether suspended singly or in cable, tubes, pipes or conduits, above ground or under ground, owned, leased or controlled by them in the city of Philadelphia. Failure to make such a return within the time provided for in this ordinance shall subject the offenders to a penalty of fifty (50) dollars per day until such return is made.

SECT. 7. That on all conductors or wires suspended above ground, excepting such as are used or owned by the city of Philadelphia, an annual payment of five (5) dollars per mile or any part thereof in length for conductors, for electrical lighting purposes for each and every wire or conductor, and of two (2) dollars and fifty (50) cents per mile or part thereof in length of wires or conductors for each and every wire or conductor used or to be used for telegraphic, telephonic, or other purposes; and on all wires or conductors placed under ground, excepting such as are used or owned by the city of Philadelphia, an annual payment of two (2) dollars and fifty (50) cents per mile or any part thereof in length for conductors or wires for electrical lighting purposes for each and every wire or conductors, and one (1) dollar per mile or part thereof in length of conductors or wires for each and every wire or conductor used or to be used for telegraphic, telephonic or other purposes, shall be paid to the city treasurer on or before the first Monday of May, 1883, and annually thereafter, in advance, on or before the

first Monday of January. Failure to make payment as re-
73 quired within the time herein specified shall subject the offenders to a penalty of fifty (50) dollars per day for each and every day thereafter until payment is made. All penalties provided for in this ordinance shall be recovered as like penalties are now by law recoverable.

SECT. 8. That an annual license charge of five (5) cents per running foot on all underground conduits, tubes or pipes for electrical conductors not exceeding twelve (12) inches in diameter, and on all other conduits, tubes or pipes for like purposes, exceeding twelve (12) inches in diameter, an annual license charge of ten (10) cents per running foot be made payable to the city of Philadelphia, at the same time and under the same provisions as are provided in section 7, for the payment of charges for conductors and wires.

SECT. 9. That any corporation, firm or person, shall, before erecting or laying any conduits, tubes, pipes, cables, electrical conductors or wires, give a bond and warrant of attorney, with good and sufficient security in real estate, to be filed of record, or Government, State or city bonds, to the city of Philadelphia, in the sum of twenty thousand (20,000) dollars, conditioned, that they shall properly relay and pave all openings made by it or them, and thereafter keep in repair the paving over said openings, and that they will make return and pay the annual license charge for undergound conduits, tubes and pipes, including all the electrical conductors and wires contained in said conduits, tubes, pipes or cables, as
74 well as the annual license charge for all overhead wires, cables or conductors, as hereinbefore provided, and will comply with the provisions of this ordinance and of all other ordinances now in force or hereafter to be passed, regulating the introduction, use, maintenance, taxation or license charges of telegraph, telephone, electrical conduits, conductors, wires or cables in the city of Philadelphia. The said bond shall be approved by and filed with the city solicitor, and a certificate of such approval and filing shall be furnished to the chief commissioner of highways before he shall issue a permit for the opening of any street, alley, lane or road, and the corporation, firm or person shall also pay to the city treasurer the sum of fifty (50) dollars, for the publication of the ordinance authorizing it or them to lay such conduit, tube, pipe, conductor, wire or cable.

SECT. 10. That if any underground conduit company or individual should at any time dispose of any of the franchises granted by any ordinance of councils, or consolidate with any other company, the company so selling or consolidating shall forfeit all rights and privileges granted by such ordinance, and shall be liable to, and shall pay to, the city of Philadelphia a penalty of twenty-five thousand (25,000) dollars, to be sued out and collected by the city solicitor; the company or individuals buying from or consolidating with aforesaid individuals or companies shall be liable and shall pay to the city of Philadelphia the sum of twenty-five (25,000) dol-
75 lars, to be sued out and collected as hereinbefore prescribed.

SECT. 11. That any corporation, firm or person erecting or laying any conduits, tubes, pipes, cables, electrical conductors or wires, shall erect or lay such conduits, tubes, pipes, cables, electrical conductors or wires clear of all other pipes.

SECT. 12. That the ordinance entitled "An ordinance to regulate the introduction and use of underground conduits, electric cables and wires for electrical conductors in the streets of the city of Philadelphia, and to provide for charges for overground wires," approved June 21, 1882, as well as all other ordinances or parts of ordinances inconsistent herewith, be, and the same are, hereby repealed; except so far as any penalties have been heretofore incurred by reason of non-compliance by any firm, corporation or person with the provision of any such ordinance, for which purpose said ordinance shall remain in force.

Approved the thirtieth day of March, A. D. 1883.

SAMUEL G. KING,
Mayor of the City of Philadelphia.

76 Also the ordinance of August 5th, 1886, page 243, of the Book of Ordinances for that year *Pro ut* same.

(*Copy of Ordinance, August 5th*, 1886.)

An ordinance regulating the laying and construction of underground wires, electrical conductors, conduits, cables, and tubes in the city of Philadelphia.

SECTION 1. The select and common councils of the city of Philadelphia do ordain, That every company, corporation, firm, or individual desiring to lay or construct a line or lines of telegraph, telephone, electric light wires, electrical conductors, conduits, cables or pneumatic tubes under any of the streets or highways of the city shall first file with the board of highway supervisors an application in writing, accompanied by a general plan and specification, showing the location of the proposed work, and so far as shall be practicable that of all structures existing under said streets or highways upon which they may desire to lay or construct their line or lines of wires, electrical conductors, conduits, cables, or tubes.

SECT. 2. In order to avoid the placing of unnecessary wires, electrical conductors, conduits, cables, or tubes on streets or highways already occupied by such, and to avoid interference with the
77 water, gas, and sewerage system of the city, the board of highway supervisors shall have authority to alter and change the route or plans submitted by any company, corporation, firm, or individual, as they may think for the best interests of the city; and upon the approval of a route and plan by the said board of highway supervisors, they shall cause said route and requirements to be drafted into the form of an ordinance to be submitted to councils for their approval or disapproval. The said ordinance shall be accompanied by plans approved by the board of highway supervisors.

SECT. 3. The board of highway supervisors are hereby authorized,

upon the passage of a resolution by councils, to grant permission to any company, corporation, firm, or individual to which privileges have been or may hereafter be granted for the construction of main lines of telegraph, telephone, electric light wires, electrical conductors, conduits, cables or pneumatic tubes, to lay or build branch lines therefrom not extending beyond three squares direct from the main lines, which privilege shall be revocable at any time by councils.

SECT. 4. The laying, construction, and maintenance of all wires, electrical conductors, conduits, tubes, or cables shall be under the supervision of the chief of the electrical department, and subject to his approval; and the same shall be laid under the rules and regulations of the board of highway supervisors.

78 SECT. 5. That every company, corporation, firm, or individual, to which privileges have been or may hereafter be granted for the laying or construction of a line or lines of wires, electrical conductors, conduits, cables or tubes, shall be liable for any injury or damages to gas, water mains, pipes, or sewers, by the opening of the streets, or the laying of their wires, electrical conductors, conduits, cables or tubes therein, and this condition shall be set forth in the bond provided for in section 11 of this ordinance.

SECT. 6. That whenever the city may desire to use or occupy any of the wires, electrical conductors, or cables for municipal purposes, the company, corporation, firm, or individual, to which the privilege has or shall hereafter be granted for laying or constructing such lines or branches, shall furnish three good working wires upon thirty (30) days' notice, to the electrical department, without any cost to the city.

SECT. 7. That whenever the city may desire to occupy or use a tube or chamber in any of the conduits or tubes which have heretofore been or may hereafter be laid by authority of councils, the company, corporation, firm, or individual, owning such conduits or tubes shall, upon thirty (30) days' notice from the chief of the electrical department, furnish said department, free of cost or charge to the city, at least one tube or chamber in such conduits or tubes:

Provided, that this section shall not be construed to apply to
79 companies, corporations, firms or individuals laying wires who have complied with section 6 of this ordinance, of which compliance the chief of the electrical department shall be judge.

SECT. 8. That every company, corporation, firm or individual, to which privileges have been granted for the laying of pneumatic tubes, shall, upon notice from the chief of the electrical department, supply free service to the city of Philadelphia and the departments thereof, between such points as or may be reached by their system.

SECT. 9. Every company, corporation, firm or individual, to which privileges have heretofore or may hereafter be granted, for the laying of wires, electrical conductors, conduits, cables or tubes, under any of the streets or highways of the city, shall on or before the first Monday of November, in each and every year, certify under oath to the chief of the electrical department, the number and location of

wires, electrical conductors, conduits, cables or tubes, and the miles of wire laid underground, by authority of ordinance. Upon failure to make such a return on the part of any company, corporation, firm or individual within thirty days from the time specified, the privileges granted by this or any other ordinance, or by the board of highway supervisors, under resolution of councils, shall cease and determine, and the chief of the electrical department shall thereupon cause the wires, electrical conductors, conduits, cables or tubes to be either disconnected from the buildings or removed from the streets, and any expense or cost resulting
80 therefrom shall be charged to and against such company, corporation, firm or individual, and the city solicitor is directed and authorized to collect the cost from such company, corporation, firm, or individual for said disconnection or removal, by proceeding upon the bond as required to be given by them, as provided in section 11 of this ordinance. And should the amount of said bond be insufficient to cover the costs and charges, he is further authorized and directed to take other proceedings to recover the same.

SECT. 10. The chief of the electrical department shall at all times have free and unobstructed access to the wires, conduits, cables, electrical conductors or tubes for the purpose of inspecting the same or making connections therewith for wires or conductors in use or to be used by the city.

SECT. 11. That upon the passage of an ordinance granting any company, corporation, firm or individual, privileges under this ordinance, or any ordinance now in force, or to be hereafter passed, relating to or regulating underground wires, electrical conductors, conduits, cables, pipes or tubes, the said company, corporation, firm or individual shall, before exercising any privileges thereunder, give a bond, to be drawn and approved by the city solicitor, and to be entered of record, in the sum of five thousand (5,000) dollars, conditioned that they will properly relay and pave all openings made by them, and thereafter keep in repair for a period of
81 three years the paving over said openings, and that they will comply with the provisions of section 5 of this ordinance for a like period of three years. And a certificate of such approval shall be furnished by the city solicitor to the board of highway supervisors before a permit shall be issued for the opening of any street or highway for the purposes named; and the company, corporation, firm or individual to which any privilege is granted shall, before the issuance of a permit, pay fifty (50) dollars to the city treasurer, for printing of the ordinance granting the privileges asked.

SECT. 12. Should any company, corporation, firm or individual to which privileges have heretofore been or shall hereafter be granted for the laying of underground wires, electrical conductors, conduits, cables, or tubes, dispose of any of the franchises granted by ordinance, or lease to, consolidate, or merge with any other company, corporation, firm, or individual, they shall forfeit all rights and privileges granted to them by the city of Philadelphia, and upon satisfactory proof being furnished to the chief of the electrical department and

the city solicitor, they are hereby authorized and directed to take similar action against the offending company, corporation, firm or individual, as provided for in section 9 of this ordinance.

SECT. 13. All ordinances providing for license charges upon underground wires, electrical conductors, conduits, cables, or tubes,
82 as well as all other ordinances or parts of ordinances inconsistent herewith be, and the same are, hereby repealed.

Approved the fifth day of August, A. D. 1886.

WILLIAM B. SMITH,
Mayor of Philadelphia.

83 Also the return of the Atlantic & Pacific Telegraph Company, of poles and wires maintained by them during the years in question.

Plaintiff rests.

Defendant's Evidence.

Mr. PETTIT: I offer in evidence a certified copy of the charter of the Western Union Telegraph Co., to which the line of poles and wires in question belonged.

Also the acceptance by the defendant company, the Atlantic & Pacific Telegraph Co., of the act of Congress of 1866, filed on March 19, 1867.

Also the circular of the Postmaster General, fixing the Government rates to be paid for messages transmitted by this company in compliance with that act.

WILLIAM B. GILL, having been duly sworn, was examined as follows:

By Mr. PETTIT:

Q. What officer, if any, are you of the Atlantic & Pacific Telegraph Company?

A. Superintendent.

Q. And for what district or what location?

A. From the city of Washington or the Potomac river, to
84 the Allegheny mountains.

Q. And north how far?

A. As far as the New York State line.

Q. Are you a similar officer of the Western Union Telegraph Company?

A. Yes, sir.

Q. In point of fact, in the years mentioned in this suit, from 1885 to 1891, were or not the lines of the Atlantic & Pacific Telegraph Company owned and operated by the Western Union Telegraph Company?

A. Yes, sir.

Q. Have you been in charge of the wires and poles upon which this tax was laid during the years in question, that is to say, 1885 to 1891?

A. Yes, sir, continuously.

Q. Can you describe the route of those poles and wires? Do you know where they were located?

A. In the city of Philadelphia they were located on Second street, from Girard avenue to York; they went west on York to Sixth, and up Sixth around Hunting park, till they struck the old York road. In Philadelphia they were located on Ridge avenue to Girard avenue, and on Girard avenue west to the bridge, and they went beyond the bridge originally and that part of the line was given to the city of Philadelphia.

Q. Beyond the bridge?

85 A. Beyond the bridge—my recollection is we stopped at the east side of the bridge.

Q. For what business were those wires used?

A. They were used for the general business of the entire country, messages from all parts of the South, the North, the East and West, all going to Washington or New York and New Orleans, or cablegrams or Government messages. There are six of the wires in existence at the present time, running between Baltimore and Washington, which are used in the general business of the Government and of commercial business that originates at Washington or goes to or from it.

Q. Confine yourself to the poles and wires that were denominated Atlantic & Pacific poles and wires in the city of Philadelphia.

A. Yes, sir.

Q. In the years 1885 to 1891. I understand you to say that those wires were used for the transmission of business from the States north to the States south and to the States west and *vice versa?*

A. Yes, sir, any business that might originate in any part of the country.

Q. As well as to and from Philadelphia?

A. Yes, sir.

Q. During that time what regulations or supervision did the city of Philadelphia exercise over those poles and wires?

86 A. None. The supervision and regulation is looked after by the telegraph company itself. When we desire to take down a line of poles with wires on, we get a permit from the electrical department. If we desire to renew a line of poles, we get a permit from the electrical department, and then we get a permit for our line which is given once a year. That refers to the repairs or the maintenance of the line. I have copies of those in my pocket, if you desire them.

Q. Let me have them.

(Witness produces papers.)

Q. These appear to be for the year 1891. Were those of the previous years in the same form?

A. Yes, sir, the phraseology might have been a little different; the same thing in effect.

Q. The same general form?

A. Yes, sir.

Q. I find one here dated January 1, 1901, permit to the Western

Union Telegraph Company, to repair their overhead wires until December 31, 1901, unless otherwise ordered by the department. This permit is not good for the erection of additional wires or extension of line. Signed by the chief of the bureau.

A. That is a repair permit, or maintenance.

Q. Was that the form you had for those six or seven years in question?

87 A. As far as my recollection carries, that is the same form except, as I stated before, that the phraseology might have been somewhat different.

Q. The others appear to be special permits to renew specified wires, or to take down specified wires on poles.

A. Yes, sir.

Q. I suppose to erect specified wires on poles?

A. Yes, sir.

Q. Those permits you got besides those general yearly ones?

A. Yes, sir.

Q. How many would you get?

Mr. MILLER: I submit that is not important. Apparently the object in proving the number of permits given for repairs is to show that this company kept its wires and poles in good condition. But it has been decided that is not a ground for reducing the amount of the charge, inasmuch as the charge is properly based upon the supervision necessary for all the poles and wires in Philadelphia, whatever company they may belong to.

The COURT: We will receive the evidence for the present, and determine what effect it will have after.

Q. How many would you get?

A. I should judge we got about two a month.

Q. During all the time, the seven years in controversy,

88 who was the chief of the electrical bureau?

A. Mr. D. R. Walker.

Q. And is yet?

A. Yes, sir.

Q. When about was it that electric lights were introduced into the city of Philadelphia commercially so as to amount to any general use?

A. I think it was somewheres around 1883 or 1884. I am not positive of it.

Q. Prior to that time had there ever been any danger or trouble arising from the presence of telegraph poles and wires in Philadelphia?

A. None whatever.

Q. Since that time the trolley wires have also been introduced, have they not?

A. Yes, sir.

Q. And are they liable to produce any difficulty or danger or trouble with telegraph wires, if they come in contact?

A. So far as my knowledge goes, I should say yes. I have heard

it claimed that they do not, but I never like to get in contact with one of them.

Q. The electric light wires are insulated, are they not?

A. They are insulated when they are first erected, but that insulation wears off.

Q. And then they become dangerous?

Yes, sir.

89 Q. Or may become dangerous?

A. Yes, sir; contact with them is sure death.

Q. How about trolley wires; are they insulated or can they, in the nature of things, be insulated?

A. The trolley feed-wire, which carries the big current, they are underground. Of course their trolley wire, what is called the trolley wire, that is not insulated. That is where the trolley is.

Q. That necessarily has to be open?

A. Yes, sir.

Q. Is there any account kept by your company of the expense of the inspection and maintenance and repair of the lines of the company?

A. Yes, sir, a strict account kept and rendered every month and audited every month.

Q. Have you a statement showing what that expense is?

A. I had a statement made up, and I think the clerk brought it over.

Q. Is that a tabulated statement showing the yearly expense, and the average expense, for the seven years in controversy (handing witness paper)?

A. Yes, sir.

Cross-examination.

By Mr. MILLER:

Q. Suppose a wire of some other company falls over one of your wires, an arc-light wire for instance, falls on one of your wires, how soon do you find it out?

90 A. Almost immediately.

Q. Do you ever find it out before it gets that far?

A. No, sir, we cannot find it out before it gets that far.

Q. That is to say, if such a wire overhanging one of yours, and were to begin to sag and get nearer and nearer to one of yours, you would find it out pretty quickly after it touched yours?

A. No, sir, not exactly.

Q. Did you say just now you would not find it out until it got there?

A. I understood your question to be a broken wire, not a wire that was crossing or a suspended wire.

Q. I have your answer as to a broken wire. What is your answer as to a suspended wire?

A. A suspended wire we would likely find that out as we have done in numerous cases. We go and lift the wires up, or arrange with the electric light company to lift theirs up.

Q. You would be likely to find that out before it got as far as your wires?

A. Yes, sir.

Q. And you would go and stop it?

A. Yes, sir.

Q. How would you find it out?

A. By the eye.

Q. But not from your office at 10th and Chestnut, if it was
91 very far away?

A. No, sir. I am not employed for that. The linemen are employed for that.

Q. How many men have you employed for that in Philadelphia?

A. I thought maybe you would ask me that, as you always do, so I had a tabulated statement made here of the names.

Q. Give me the number. That will answer my question.

A. They are employed at different times. Some of them are not employed continuously.

Q. How many have you employed today?

A. The continuous ones are fourteen.

Q. How many have you employed today for that purpose?

A. I cannot answer you that question because there might be a dozen men put on extra today.

Q. How many men do you have in the employ of the company all the year round continuously, throwing out the extra ones?

A. An average of fourteen.

Q. I did not ask you anything about an average because an average includes extra ones. I want to know how many you have in steady employ.

A. Fourteen men.

92 Q. Is fourteen the average or is fourteen the number you always have?

A. Fourteen men in what you may term constant employ. In order to make this statement—a man might be sick. A man might be off, and another man in his place.

Q. Is fourteen the average or is fourteen the minimum?

A. Fourteen you might call it the minimum or maximum.

Q. What do you call it?

A. I call it the maximum.

Q. What is the minimum?

A. Fourteen.

Q. Fourteen is both the minimum and maximum?

A. Yes, sir.

Q. And also the average?

A. If you bring it up you make the average fourteen.

Q. Is fourteen the average?

A. I do not understand your question in the light you are putting it. Here is about thirty names here on this paper, taken from the records.

Q. How many men besides have you in the regular employ of the company?

A. Do you mean at all parts or just in the city of Philadelphia?

Q. In the city of Philadelphia. I do not mean your operators. I mean linemen. How many have you besides those fourteen?

A. We have those fourteen station linemen. We have men that are what we call in gangs, gangmen. They are always subject to call. They are working in the city of Philadelphia. The

93 men come from Lancaster or Harrisburg or Havre de Grace. They work in the city of Philadelphia, just according to the exigencies of the service.

Q. I would like to know how many more men than the fourteen you have, whose duty it is to look out for sagging wires, you have employed regularly in the city of Philadelphia to make repairs.

A. Those men I am talking about, the gangmen, they are not the men that look after sagging wires. That is the regular force of fourteen men.

Q. How many men have you besides, working all the time at repairs?

A. I cannot answer that question from memory.

Q. Where are those fourteen men located?

A. Different places around Philadelphia; some Broad & Chestnut; some at Tenth & Chestnut.

Q. How many stations have you?

A. We only have what we might term two stations, one at Broad & Chestnut, and the other at Tenth & Chestnut, because the men report to a man who does nothing else but look after and send them out over routes.

Q. Whatever the reason may be, it is a fact you have two stations?

A. Yes sir.

Q. Do those men always report at one or the other of those stations in the morning?

A. Yes, sir.

94 Q. Have you got the number divided between the two stations?

A. No, sir.

Q. What is their duty after they report?

A. Look after these lines.

Q. I suppose so, but how do they go about it? Are they sent out to a certain point when there is need of their work there? Is that the way they do their work?

A. That is part of the way they do their work.

Q. What is the rest of the way?

A. The rest of it is to look after the different sections of their lines.

Q. Please tell us how that is done.

A. I cannot tell you that, because I do not follow after them. A lineman is a man that patrols and goes over the lines, and if there is anything the trouble with them, he fixes it. I cannot tell you every footstep he takes.

Q. You do not understand me to ask you that?

A. That is the way I understand your question. I cannot understand it any other way.

Q. What I would like to know is, what the regulations may be

governing the action of those men outside of their duty to go to a specified point and make repairs.

A. To examine, look after and patrol their sections, that is their lines.

Q. How many sections have you in the city?

95 A. One on Front street.

Q. I ask you the number.

A. I cannot. I do not carry all this in my mind.

Q. You do not know the number?

A. No, sir. I know where they are all located.

Q. More like five or more like fifty?

A. I should say probably about eight or nine.

Q. Is there a man assigned to each section?

A. No, sir.

Q. What is approximately the length of line in each section?

A. That I could not answer without figuring it all out. I can tell you on one line, for instance, which I think is the longest line, from Front and Race to Front and Norris, where it takes the railroad. I should think that is about the longest line there is in the city.

Q. Please explain to the jury what the system of patroling you have is, if you have any system.

A. A man goes over the lines and examines them and reports the condition.

Q. You mean one man starts on January 1st to walk over all the lines in Philadelphia?

A. No, sir, I do not.

Q. Explain. Does each man have a section assigned him to take up at the beginning of the year?

A. No, sir, he does not; but the man that I explained to

96 you at the headquarters, he sends the men out.

Q. Who is that man?

A. Mr. Donnelly.

Q. Is that at Tenth & Chestnut?

A. Yes, sir.

Q. His headquarters?

A. Yes, sir.

Q. What is his system for sending the men out?

A. First, if he has any trouble he sends a man out on the trouble.

Q. If there is a repair at some specific place called for?

A. Yes, sir.

Q. What next?

A. If there is a pole that has to be moved in order to make way for a curb, where they are putting in a circular curb, if there has to be new curbing put in, and the poles have to be shifted out or in, he sends the men on that. Very seldom that occurs. I can hardly recollect the time. He has a man patrolling and looking after these lines. That is about as plain as I can make it for you. Just the same as if I asked you to walk up Tenth street, and you

were in the telegraph business, to look over that line and examine. That is all can be done.

Q. Do you mean this man will occasionally send one of the linemen to a particular stretch of street and asking him to ex-
97 amine the wire along that street?

A. I do not recollect saying occasionally. I said that was continuous service.

Q. I think you said it happens hardly once a year, or rarely; you could not recollect it.

A. Referring to the necessity of moving poles in the manner that I referred to, that is by new curbing and things of that kind.

Q. The other thing is frequent, you say sending a man to walk along a certain street?

A. That is what they are paid for, for that continuous service of looking after the section.

Q. Is it frequently?

A. Certainly.

Q. Can you tell us the system, because so far you have told us simply that this man Mr. Donnelly sends out a man to a particular street. I want to know whether you have any methodical system by which you secure a patrol-ing of the whole line within any definite time?

A. I do not understand what you mean. I am too obtuse for that.

Q. I did not say that. I will try to make it clear. You have told us that these fourteen men do two things. They go on special order to a place where repair is needed or change, and they patrol the line of the company. You have said that the man who has charge of the patrolling of the line is some one at Tenth and Chestnut street-, who very commonly sends a man to patrol
98 the line on a certain street between certain points. Now I would like to know whether there is any system for such work, or method which results in insuring that every part of the line within any definite period of time is patrolled.

A. Let me see if I understand your question. Do you want me to say whether a man goes from Front and Norris to Kensington depot on Monday, Tuesday, Wednesday or Thursday. Is that what you call definite?

Q. No, sir, I do not mean that. I want to know if there is any system which insures that all the lines will be patrol-ed in a given time.

A. Oh yes, for the reason——

Q. I did not ask you for the reason. I cannot explain it to you any more than I have. You have already made a beginning, I think. You have said yes, that there is a system.

A. Yes, sir.

Q. Which insures that all the line will be patrol-ed within a definite period of time. What is the definite period of time?

A. I will guarantee to say there is not a wire in trouble in Philadelphia today, showing the patrolling and the care.

Q. Will you tell us the definite period of time?

A. I cannot name the definite period of time. I told you it is continuous, but when I say continuous, it does not mean that
99 one man goes at ten o'clock and another one at eleven, and another one at twelve. We do not patrol lines in that way, and never did, and it was never done.

Q. Then I gather from your testimony there is no more system about patrolling than you have explained. Patrolling is done by your company, is that so?

A. That is all.

Q. Do you say that the danger in connection with electric wires began when electric light wires were hung in the city?

A. Yes, sir.

Q. After that there was danger, was there?

A. Yes, sir.

Q. Therefore there has been danger since 1883?

A. I am not sure that that is the year. That is only from memory?

Q. If it was the year when they began?

A. Yes, sir.

Q. The heavy-current wires are the arc-light wires, are they not?

A. Yes, sir.

Q. They run to 3000 volts?

A. Yes, sir, and I guess sometimes more.

Q. 500 volts is enough to kill a man?

A. No, sir, it takes about 1000.

Q. It depends upon conditions?

A. Yes, sir.

100 Q. Suppose the thing that I spoke of a minute ago happens, that arc-light wires sag and rest on one of your telegraph wires; suppose that the insulation of the electric light wire has become broken before the contact or is sawed away by the contact, what becomes of the current in the arc-light wire?

A. It may lead over our wire into our office and set it on fire.

Q. Is it likely to run along your line?

A. Yes, sir.

Q. When will it stop?

A. I cannot tell you that.

Q. Is it liable to go some hundreds of miles?

A. It has been claimed that it has done so. I do not know that of my own personal knowledge, but I have heard it claimed it does.

Q. Did I understand you to say that the city made no supervision of your wires or of electric wires in the city?

A. None that I am acquainted with.

Q. Do you know whether the police officers of the city are required, as part of their duty, to look out for crosses and out-of-place wires and dangerous telegraph poles?

A. No, sir. I do not know that positively. I have heard you make that statement and claim.

101 Q. I do not ask you to take it on my word. As a matter of fact you do not know it?

A. No, sir, I know they cannot do it. Therefore a man cannot do that which is impossible or impracticable.

Q. Do you know whether they have a direction to do it?

A. I think I know that from hearing Judge Beitler say so.

Q. The former director of public safety?

A. Yes, sir, I think I heard him say so.

Q. Against that you have your own judgment they cannot do it?

A. Not only judgment, but that is predicated on absolute knowledge.

Q. Are you aware, as a matter of fact, that overhead wires along curbs interfere with the handling of fire ladders?

A. I do not know that from personal knowledge. I only know that from hearing in the court here the testimony of several people who claim that. The fact of my long experience in the city of Philadelphia, commencing here as a messenger boy, and I could not refer you to a day where there was any interference by the overhead wires during any fire.

Q. You are not a fireman, are you?

A. No, sir, I am not a fireman.

Q. Have you known cases where a lot of wires in front of a portion of a building were cut in the work of putting out a fire?

102 A. I am not positive of that. My recollection is at one time, at the fire at the theatre on Walnut street, above Eighth, that the fire burned a pole down. I was at that fire getting our lines up, but I do not recollect the wires being cut.

Q. I understand the state of your information upon the subject to be, that you have no knowledge, you have no information to the effect that wires in front of buildings ever interfered with the fire service, and that you never knew a single instance where wires were cut, when fires were being put out, although you did know one case where wires were broken by a falling pole that had burned?

A. The wires were not broken; I did not say the wires were broken. I said it allowed the wires to drop down from the pole.

Q. That is all you know about it?

A. Yes, sir, I never go to fires. I am busy enough attending to other things.

Q. Have you any knowledge of the subject of ordinances considered by committees of the councils and passed at said councils, regulating this subject of electric wires in the city?

A. Yes, sir, I have a knowledge of those. I think I attended very near every meeting.

Q. Would you say that such city ordinances averaged a

103 dozen or twenty in the course of a year? I am speaking of that referring to the subject of private companies having electric wires in Philadelphia.

A. That I cannot answer, because I do not have knowledge of other companies.

Q. You know that some such ordinances have passed?

A. I only know of such ordinances that affected the Western Union or its system.

Q. You told us that a policeman could not look after a telegraph wire with any advantage. Please tell us why a policeman is incapable of doing that thing.

A. Because the necessary thing to do to ascertain the condition of a wire and to look after it is to climb the pole, and I know policemen do not climb poles nor shin up them.

Q. He does not have to climb a pole to find whether the pole is in a dangerous condition?

A. Not the pole, he does not.

Q. That much he can do. You will have to take back what you said that far, will you?

A. That much he can do, the same as he walks along and might see an ash barrel.

Q. He can do that. Let us come to the matter of wires. Can he or can he not see an arc-light wire that has sagged out of place and is getting dangerously near to one of your wires?

A. I doubt it very much.

Q. Is it because policemen have bad eyes or because no-
104 body can see the height of a telegraph pole?

A. Of course the distance is so great it requires experience. I could take you along the line and show you two wires, and you would say both crossed, and they would not be touching each other at all.

Q. Do you mean the ordinary man cannot see a telegraph wire at the height of a telegraph pole?

A. Not in the cities, like they are here. You can out in the country but you cannot in the city.

Q. You assert as a general thing, we here, if we go out in the street, cannot see the telegraph wires on the top of poles?

A. No, sir.

Q. Possibly to some of us that seems strange. Is there anything that you have to say in explanation of that statement?

A. Yes. When our men go after that, a cross, that would be two wires together, they have climbers on and go up the pole? When you get on the level of it, you can see it.

Q. I am asking about the possibility of seeing telegraph wires on the top of telegraph poles. Is there anything that you want to say in explanation of your statement just now, that in the city here we can-ot see that far?

A. Yes, sir.

Q. Have you anything to say in explanation of that?

105 A. No, sir, no more than to my knowledge you cannot do it without experience.

Q. Suppose a guy wire is attached to a pole, a pole going into the private property of an individual, perhaps, if there are such, or a trolley pole, although it would not be needed for its support, is it not possible for a police officer to notice whether such wires strung up are placed in a position where they are likely first to cross an arc-light wire, and then to cross one of your wires?

A. With a guy wire that is a different thing entirely because a guy wire is a guy rope made of wire, about seven strands, and of course that is an entirely different thing.

Q. A policeman can see that?

A. Yes, sir.

Q. Particularly if one end comes to the ground, the policeman can see that?

A. Undoubtedly, if it was on the ground.

Q. That much a policeman can do. He can look out for danger of that kind, can he not?

A. From the guy breaking?

Q. Yes, sir.

A. Yes, sir, he can do that. He would very seldom ever do it, though.

106 Q. Is it or is it not true that fire-escape boxes have wires coming down the pole, from the upper end, on the outside of the pole, not sunk in the pole, but on the outside?

A. I think in some cases it is so. I think the city has some on our poles.

Q. I mean fire-signal boxes.

A. Yes, sir.

Q. That is what you meant?

A. Yes, sir, but they are all insulated.

Q. You told us a little while ago that insulation did not always last. Is that true?

A. It does not always last. I would not make the statement that insulation put in this building and encased would not last. I was answering a supposed case of yours, whether it was going to do this thing and the other, and that talk of rubbing.

Q. Is it or is it not likely, that the insulation on a fire-signal wire would get broken so that it would fail to serve an emergency?

A. Not from my knowledge it would not here in Philadelphia, because the wires are kept by the city in too good a condition. Therefore I would unhesitatingly say it could not occur.

Q. Suppose a vehicle would come against such a wire, would that be liable to break the insulation?

A. No, sir, because the insulation is too high for the vehicle.

107 Q. You mean that wire coming down the pole does not come down as low as where it could be struck by a vehicle?

A. No, sir, I do not think so.

Q. What is the usual height of the fire-signal boxes?

A. I cannot answer that except to know that it is higher than a vehicle.

Q. Do I understand you to say that the electrical bureau performs no supervision?

A. Except that that I have named in issuing the permits.

Q. Have you heard Chief Walker testify to the contrary?

A. I have not that I recollect.

Redirect examination.

By Mr. PETTIT:

Q. Something has been said about these wires, patrolling the wires and so forth. If a telegraph wire becomes weakened, either

by rust or from any other cause, does it or not affect its conductivity?

A. Yes, sir, it affects its working capacity at once, which is its conductivity.

Q. Is or not that fact apparent to the operator?

A. It is apparent to what is termed the test operator, who uses a galvanometer on it to examine to see when, for instance if a wire had eighteen ohms' resistance, was to run up to fifty ohms' resistance, immediately there would be another one to take its place. That is not a broken wire; that is not broken.

108 Q. Of course when the wire is broken, that ends it?

A. Yes, sir, the instrument stops at once. The moment a break occurs anywhere, that moment the instrument stops.

Q. If the wire becoming weakened by rust, or from any other cause, the fact of its becoming weakened is apparent to the test operator before it becomes broken?

A. Yes, sir, and then that wire is patrolled and pieces of it cut out and brought in to show its general condition. For instance, they cut out a piece every twenty-five or thirty poles to see whether it was general or just in some particular place. The wire will last a great many years in one place, where it will not last in another. On the Pennsylvania railroad going west, a wire there will not last over eight years, while I had a piece brought over from the Bedford pike that was put there forty-five years ago, and it is apparently as good as the day it was put up.

Q. Then what does the company do as soon as the test operator finds that the working capacity of the wire is affected?

A. He sends that with the report to the superintendent. The superintendent has that wire renewed by taking out—not the man referred to by Mr. Miller, but gangmen.

Q. Does or not the conductivity or the working capacity of the wire become affected long before it becomes so weakened as to be in danger of breaking?

109 Objected to as leading.

(Question withdrawn.)

Q. State whether or not a wire may be strong enough to hold itself up, and yet be defective in conductivity.

A. Yes, it often occurs that a wire shows poor conductivity, and a physical examination of it discloses that the wire is in fair condition or what you may call good condition, but where the joints are made on the wire they have elongated some or rusted, and the leakage is in the joints. That is one of the methods of determining, and the other is called its physical examination, and — it is found that it has rusted, it is taken down and another wire put in its place.

Q. What I want to know is, whether a wire can become weakened to such an extent as to be in danger of falling, without its conductivity being affected.

A. Not in a general sense. It may, if it happens to have a factory joint in it that would be defective. That is the only thing. If it

happens to have a defective joint in it, made at the factory, where they are put together. The moment that wire commences to deteriorate its conductivity goes down. In other words, it is not as efficient, does not give as efficient service as it did when it was in proper shape.

Q. Is it or is it not a fact that the dangerous condition of a
110 wire that is operated by the Western Union Company would be known from the test office quicker and better than by external observation?

A. Undoubtedly.

Q. Something was said about the current being carried great distances in case of a cross with an electric light wire. About how often are the wires of the telegraph company grounded?

A. What with? Do you mean electric light wires?

Q. No, sir, the telegraph company wires, how often are they grounded?

A. I could not answer you that question.

Q. Could not answer it as a general proposition?

A. No, sir.

Q. The current from the electric light wire would not be carried beyond the point where the wire was grounded would it?

A. An electric light current of a wire coming from contact might go to ground, and it might go around the office and strike a dozen other wires, so that I could not answer your question. I have heard it stated that a wire crossed at Baltimore created a fire in Washington, but that did not come from positive knowledge of the parties who said it. It was only their thought about it. Another thing,
you could not tell which way a current is going to go. The
111 general supposition is that the earth is a reservoir for all electric currents, and, like lightning, the electric currents are all making their way to the earth. That seems to be the place they are seeking all the time, and yet sometimes it would take the longer distance on the wire, when they could have taken shorter ground.

Q. What is the ordinary number of poles and number of wires to a mile in the city of Philadelphia?

A. I should judge about thirty-seven. That is our usual calculation.

Q. Thirty-seven what?

A. Poles to a mile.

Q. About how many wires do the poles carry?

A. Some poles have a large number on, and others have a small number.

Q. What is the average in this city?

A. I should judge somewhere around twenty or twenty-five, I think there was, about, at the time of the Atlantic & Pacific. I think there is less now.

Recross-examination.

By Mr. MILLER:

Q. Did I correctly understand you to say that approaching dan-

gers from electric wires were more readily detected from the test office than by patrolling?

A. No, sir, I did not.

112 Mr. PETTIT: I offer in evidence that statement identified by the witness.

(Marked "Exhibit 1, April 17, 1901, M. F. M.")

Also statement compiled from the reports of the electrical bureau, showing the total amount of the license charges for poles and wires for telegraph, telephone and electric light companies in the city of Philadelphia, for the seven years in question.

(Marked "Exhibit 2, April 17, 1901, M. F. M.")

Also statement of the number of poles and miles of wire belonging to the city of Philadelphia, erected and maintained in the streets during the years 1885 to 1891, both inclusive.

(Marked "Exhibit 3, April 17, 1901, M. F. M.")

Also statement compiled from the reports of the chief of the electrical bureau, showing the general expenses of his office for the years 1885 to 1891, both inclusive.

(Marked "Exhibit 4, April 17, 1901, M. F. M.")

Mr. PETTIT: I want to read from the reports for the years in question in respect to this matter of permits.

I read the following from the report of the chief of the electrical bureau for the year 1886:

The department issued 250 permits during the year, for
113 the erection of poles, wires and general repairs to the lines of parties who were authorized by councils to construct and maintain telegraph, telephone and electric light wires for overhead and underground service, being a decrease of 136 from the issue of last year. This decrease was mainly caused by the position taken by councils against the overhead service and a determination that something must be done to prevent the accumulation of overhead wires and place them beneath the surface of the streets and the refusal of the department to issue permits except where necessity requires it. Permits were only issued during the year for the extension of the electric light service authorized by councils; no permits were issued for the extension of the telegraph and telephone pole lines.

I have no published copy of the report for the year 1885. The department has none.

I read now from the report of the chief of electric bureau for the year 1887, in this connection.

The bureau issued 146 permits during the year, for the erection of poles, wires and general repairs to the lines of parties who were authorized by ordinance to construct and maintain telegraph, telephone and electric light wires for overhead service, being a decrease of 104 from the issue of last year. This decrease was mainly
114 caused by the refusal of the bureau to issue permits except where necessity required it. The position taken by councils against the overhead service and a determination that something must be done to prevent the accumulation of overhead wires and

place them beneath the surface of the streets. Permits were only issued during the year for the extension of the electric light service authorized by councils. No permits were issued for the extension of the telegraph and telephone pole lines.

From the report of the same department for the year 1888:

"There were 161 permits issued during the year for the erection of poles and wires, and for general repairs to lines already erected, to those authorized by councils to maintain overhead electrical service; increase in the number issued of 15 over last year; the permits issued for the erection of new poles were only given for the extension of the electric light service for public lighting and for those authorized by ordinance to erect poles for their method of central distribution by means of underground wires, 219 applications for permits were approved by the chief for underground electrical companies to open the streets for the introduction of their service."

115 Report of the same bureau for the year 1889:

"There were 289 permits issued during the year for the erection of poles and wires and for the general repairs to lines already erected, to those erected by those authorized by councils to maintain overhead electric service, an increase in the number issued of 128 over last year; the permits issued for the erection of new poles were only given for the extension of the electric light service for public lighting, and for those authorized by ordinance to erect poles for their methods of central distribution by means of underground wires; 950 applications for permits approved for underground electrical companies to open the streets for the introduction of their service."

I have no report for the year 1890.

Report of the same bureau for the year 1891:

"The following will show the number of permits issued to each company, and the purposes for which they were granted." Then follows a tabulated statement showing 25 permits for the renewal of poles, 124 permits for the erection of new poles and posts, 270 permits for the running of new wire, 100 permits for the repairs and renewals of wire, eight permits for the removal of poles, seven

116 permits for the removal of wires, a total of 534 permits issued for overhead work, an increase of 298 over last year, due to the inauguration of new companies which had been granted privileges by councils to erect poles and wires along the highways. The following will show the number of permits issued to each company, and the purposes for which they were granted, for underground purposes. Repairs, 163 permits; house connections, 183 permits; main line, 3 permits; making a total of 349, a decrease of 108 from last year, and a total of 882 permits of all permits issued.

Defendant rests.

117 *Plaintiff's Evidence in Rebuttal.*

Mr. MILLER: By agreement, I desire to read the testimony of Abraham M. Beitler, taken on a former occasion, when very much the same questions were involved.

Mr. PETTIT: I do not object to the reading of the testimony. I object to the relevancy of it.

(Testimony read, as follows:)

ABRAHAM M. BEITLER sworn.

By Mr. MILLER:

Q. You are now judge of the court of common pleas No. 1 of the city of Philadelphia?

A. Yes.

Q. Prior to the time when you went on the bench, did you have any connection with the government of the city of Philadelphia?

A. I went on the bench in February, 1896, and prior to that time and from October, 1891, I was director of the department of public safety. Prior to that time, I scarcely know for how many years, from 1878 or 1879, I was in the law department of the city solicitor's office of the city of Philadelphia.

Q. As director of the department of public safety, what branches of the city government did you have charge of?

118 A. The department embraced the bureaus of police, fire, health, city property, building inspection, the electrical bureau and the fire marshal. The fire marshal was an officer of the department, but did not constitute a bureau. The others were bureaus presided over by bureau chiefs.

Q. During the period before the time when you were director of public safety, with what branches of the city government did your duties bring you in contact?

A. For three years or more prior to the time that I became director of public safety, I was first assistant in the office of the city solicitor, and, of course, he is the corporation counsel, and I had charge of the litigation of the city of Philadelphia, generally, and I had entire charge of the litigation of one court—the court of which I am now judge. I had the one court. Prior to that time I was second assistant.

Q. Had you, before you became director of public safety, while you were assistant city solicitor, a general knowledge of the duties and the workings of the various branches of the city government?

A. Yes, I had.

Q. Will you state to the court and jury what branch of the city government has the most intimate relations with the matter of poles and wires in the streets of the city?

119 A. The department, of course, is the department of public safety; but the bureau in that department that has the most to do with the subject is the electrical bureau; incidentally, and to an extent considerable, but not as great as the electrical

bureau, the police bureau has to do with it, and from the standpoint of inconvenience, the fire bureau has to do with the subject.

Q. Will you state to the court and jury what the duties of the bureau of electricity are in connection with the subject?

A. The electrical bureau of the city of Philadelphia is unlike, I think, the electrical bureau of any other city. It comprises all the branches of electric service, has charge of the telephone service of the city of Philadelphia, of the police system of the city of Philadelphia, including the patrol-box system and also of the fire-alarm system. It has, in addition to that, the entire charge of the erection, the renewal and the supervision of all the electrical construction, whether the city's or a company's, in locating wires, either underground or overhead.

Q. Will you state to the court and jury the part that the bureau of police play with regard to the subject of electric wires?

A. So far as concerns the wires that supply electric lighting, and only so far as reference to that is concerned, the city paying for the electric lighting, the city expects them to see that the city gets value under the contract, so far as concerns those wires and all
120 others, the policemen are inspectors. They are inspectors with regard to other matters as well as electric lighting. For instance, it is his duty to report anything which can or might result in harm to the municipality, to the citizens of the municipality, or to the travelers on the highway, whether in vehicles or on foot.

Q. Are you able to say whether there has been any more definite statement or definite instructions given to the police force with regard to the subject of wires and poles in particular?

A. I hardly know how to answer that. The police are required, and when I say "required" I mean it is laid down for them in their manual, which is their catechism by which they regulate their duties. It is laid down for them that they must report all matters that require the attention of the bureau of health, sanitary matters, all matters that require the attention of the department of public works in the matter of repairs to bridges, roadways, footwalks, or anything of that sort. They are required to report all structures over the highway that can result in harm, not only wires, not only poles, but trees and sign-posts, swinging signs, and anything that is out of order and requires attention. In urgent cases they are required to report by wire, and in less urgent cases by written report rendered through the lieutenant to the superintendent the next morning.

121 Q. What is that? (Paper shown witness.)

A. That is the form that is used in reporting the various matters that are noted at the foot of this blank. These reports, I may say, are brought in daily by the lieutenants, and upon roll call are handed to the superintendent of police, and after the superintendent of police has collected them, they are turned over to the director's office for distribution by him.

A. And what is this paper?

(Second paper handed witness.)

A. That is the same thing excepting it is larger, that is all. It a

lieutenant has a half dozen to report, he uses the smaller blank, and if he has a dozen or two he uses the larger one.

Q. And this note at the foot, "everything which requires repair should be noted, such as decaying trees, leaning telegraph poles, detached, broken, or sagging wires, swinging signs with broken supports, awning posts broken, stumps of trees or trees in the middle of the pavement," and so on, that note is for the instruction of the officers?

A. Of the patrolmen.

Q. You mentioned, I think, another branch of the department of public safety which had duties to perform relating to the
122 poles and wires?

A. That is the fire department. If I may be allowed to explain a little what is done when an alarm of fire comes in I can make that clearer.

Q. That branch of the department was under you?

A. Yes. All alarms of fire of course are transmitted electrically, and they all go to the electrical bureau no matter from what section of the city they come, they are transmitted to the police and to the fire bureaus. The fire bureau responds. If it is a first alarm, the company attached to that box go to the fire, and that alarm also brings a certain number of districts, that is police districts. It also is a summons to the electrical bureau to send their men to the scene of the fire. They go there for the protection of the city's overhead service, and also for the protection of the overhead service of other companies, to see that as little damage is done to the wire as is possible, and at the same time to let the fire bureau work with as little impediment as possible. The men in the fire bureau were, and I suppose still are, equipped with apparatus by which they may cut the wires with safety to themselves, a set of plyers the name of which Mr. Gill can give you better than I can, but they are insulated plyers, with which to cut wires in their road. If linemen are
123 upon the ground, and their services can be had at the instant, they are used, because they are more expert in that business, and can do it with less detriment to the overhead service than firemen, who are apt to clear things out of the road without regard to the structures that may be hurt by them.

Q. Are you able to state whether the presence of wires overhead on telegraph poles a little distance inside the curb line is any substantial interference with the work of the fire service?

A. I should say there was. I ought to add that it was not my custom to go to every fire, of course my duties were too onerous for that, but the larger fires that occurred while I was director of public safety I did attend, and of course I was always on the fire ground and inside of the fire lines.

Q. The present chief of the fire service is in court, I think?

A. Yes, sir.

(Cross-examined.)

By Mr. PETTIT:

Q. Before you became director you were in the city solic-
124 itor's office as you have said and had charge of the litigation; during that time, and before you were director had you any knowledge of the things about which you are now testifying, and in respect to the working of this department in relation to telegraph wires?

A. I will have to answer that this way, I had that knowledge that a lawyer would have of the conduct of his client's business, and especially that knowledge that would come to a lawyer who had no client to consult with. If a man in the law department wants to learn anything at all about an accident case, for instance or a suit for negligence against the city, he must go hunt up the men who under the department of bureaus has charge of that particular matter. Of course I had not a knowledge of these matters that I have spoken about going to fires, because I did not then go to fires.

Q. What I wanted to make clear to the court was that your testimony as director of public safety is confined necessarily to years other than the years 1889 and 1890 that are under consideration here now.

A. I cannot say whether the form of report that is used here was used prior to the time that I became director. I can say from the general knowledge of the matter that the police force in 1891 did report matters that were considered by them to be dangerous.
125 Whether their attention was as pointedly called to the matter of overhead wires I do not know.

Q. It was their business to report any obstruction in the highway, whether it was an ash barrel that was out there too long or beyond hours, or defects in the cleaning of the street, defects in the paving, and holes in the sidewalk or the curb line, or anything that was on the street either on the ground or underground so far as they could see, or overhead, never mind what it was, that might affect the public convenience.

A. The public safety.

Q. That was their duty before that form of report was devised just as much as it was afterwards?

A. Yes, I believe it was.

Q. That is the ordinary duty of a policeman. Now I understand that, barring that your own testimony as to what went on in relation to the electrical bureau relates to the time that you were director of public safety, and when it was your duty to officially know about it, does it not?

A. Well, no, I would not say that; I know that prior to 1891 the electrical bureau had a right under ordinances to issue permits, and we had linemen and inspectors, and I presume those linemen and inspectors inspected.

Q. You knew what the ordinance provided?
126 A. And I knew the force the office had in a general way.

Q. But the general conduct of the city's business that you have testified to you learned principally after you became director?

A. Yes, that is right.

Q. While you were director, or when you became director of public safety, can you state from recollection what the extent of the telegraph plant of the city of Philadelphia was?

A. No, I cannot; I would have to turn to the reports for that?

Q. Of course I do not expect you to remember exact details, but while you were director the city put up and maintained, and does maintain a very extensive plant, part of which it rents out, the part that it does not use it rents out, does it not?

A. The overhead construction you refer to?

Q. No, I refer to the underground.

A. Yes, the city began prior to the time I became director of public safety to bury its own wires, and after I became director of public safety councils were wise enough, I think, to afford the department an opportunity to lay larger conduits and rent some of the ducts of those conduits.

127 Q. Not larger ones but more of them?

A. More of them.

Q. You extended them larger?

A. I think the appropriations for underground conduits largely increased and were laid far in advance of the needs of the city, and I think today the city is deriving a very handsome revenue from the underground conduits.

Q. And it has also the largest system of public electric lighting of any city in the country, has it not?

A. I believe it has.

Q. And it attained that while you were chief?

A. Well, I do not know that; there has been a certain increase in that every year, whether it reached that distinction when I was director I do not know.

Q. Do not you know before you ceased to be director of public safety that the city of Philadelphia had more electric lights than New York and Chicago put together?

A. Yes, I think it had.

Q. And while you were director of public safety they built the trolley lines, did they not?

A. Yes, sir.

128 Q. Now, prior to the building of trolley lines and electric light lines did you ever hear of any danger whatsoever from a telegraph wire?

A. Well, electric lighting in the city of Philadelphia antedates by many years my becoming director of public safety.

Q. While you had charge of litigation?

A. Yes, while I had charge of the city's litigation, because the first electric light line was run in Philadelphia since I entered the law department of the city. I think, unless I am mistaken, that electric lighting was introduced in Philadelphia in the early eighties.

Q. My impression is that they were introduced and the first line was put up in 1881?

A. I would have said 1882 from recollection, but in 1882 I had no practical experience with regard to the subject at all.

Q. You had charge of the city's litigation, however, or some branch of it?

A. Well, I cannot say whether in 1882, or 1883, or 1884, or 1885 even, there were inconveniences felt from the erection of the arc-light wires.

Q. Did you ever have any litigation for the city out of a wire, for the conduct of electricity, whether telegraph or telephone, or
129 anything else, except where the damage was done by the trolley or an electric light wire?

A. That would require me to go over a recollection of a great many cases; I do not now recall any.

Q. Can you say that you can recollect any one?

A. I say I do not now recall any, but if my attention had been directed to that I could have given more thought to that, because I had charge of a great many electric cases while I was in the law department.

Q. The details of the extent of the city's telegraph lines, and the various points to which they reach, and so forth, are better known to the chief than to you?

A. Far better.

Q. You would prefer not to be bothered about that?

A. I could not answer the question anyhow except in a general way.

130 DAVID R. WALKER, having been duly sworn, was examined as follows:

By Mr. MILLER:

Q. What relation do you bear to the city government?

A. Chief of the electrical bureau.

Q. You have held that position how long?

A. Since 1883.

Q. Were you connected with the bureau previously?

A. Yes, sir, I have been over forty years.

Q. You are electrician, are you?

A. Yes, sir.

Q. You have full charge of everything, scientific and otherwise, connected with that bureau?

A. Yes, sir.

Q. Tell the court and jury whether there is any greater danger to the public in overhead wires than as to underground, and from underground wires.

A. Far greater risk.

Q. Mention the reasons that make the difference.

A. Underground wires are concealed in covered conduits where they cannot be interfered with, and not liable to contact with trolley or electric light wires or any other wires, and nobody can be injured

from wires underground other than where they are connected with overhead wires leading through the streets, coming in contact with those high potential wires, to electric light wires and trolley
131 wires.

Q. Are the overhead wires all supported on poles?

A. Yes, sir, mostly on buildings and poles.

Q. As a matter of fact, in your experience have any accidents occurred in the city of Philadelphia from overhead wires?

A. Yes, sir, many.

Q. Are those accidents injuries to properties, or what is their character?

A. Some cases they are, and mostly to life and injury, accidents such as killing and such as burning, showing, while in cases of electric light wires that is laying against wood on the buildings, will set fire to, providing there is a current on.

Q. Can you give the court and jury any idea of the number of accidents of that sort occurring?

A. I can only say that last year there was about twenty-five or thirty; four or five killed; as well as horses killed.

Q. You spoke of high-potential wires. I am not sure that I got what you said about that. What do you mean by high-potential wires?

A. That is electric light wires carrying anywheres, as has been expressed here, from 500 to 7000 volts' pressure.

132 Q. In the case of wires of that sort, do the accidents always occur from immediate contact with those heavy-pressure wires, or do they occur otherwire?

A. Otherwise, in direct course.

Q. What do you mean exactly by that?

A. I mean an electric light wire or another wire will come in contact with one another. The wire coming in contact with the electric light wire or the telegraph wire would be the conductor carrying the current from the electric light wire to the ground or to a terminal; commonly called in our business a ground.

Q. During the years 1885 to 1891, were there or were there not a considerable number of wires in the city put up by irresponsible parties, affording the possibility of irregular connection?

A. There were.

Q. What is the effect of the weather on electric wires?

A. Injurious as a conductor.

Q. A severe cold snap?

A. That does not hurt it so much; that makes it better.

133 Q. Sleet on the wires?

A. Breaks them down, and is liable to cause accident by the breaking of these wires coming in contact with others.

Q. Suppose there were a severe storm of sleet in the city, what would be the likelihood as to the number of places where wires would snap? Can you give us any account from your experience?

A. Yes, sir, there are cases where fifty or a hundred wires are broken down, and another time ten or twenty or whatever it may be. The electrical bureau employs linemen and construction men

who are always called in immediately and sent out in cases of that kind to disconnect or cut or repair the lines so as to remove the source of danger.

Q. Are you speaking of city wires only?

A. All wires and any wires, particularly city wires, we give them the first attention so as to enable our fire wires communicating alarms of fire and police, to have them in order in case of fire.

Q. Do the linemen of the electrical bureau do any work on wires that do not belong to the city, on occasions of fires?

A. Only where it would be beneficial to the city as well as to the other to assist a little, but not as a general thing.

134 Q. Who handles the wires at a fire?

A. Our chief line-inspector on the ground.

Q. When your line-inspector does not get there, who handles them?

A. The foreman of the gang, whoever he may be, of our linemen.

Q. When none of your men get there, who handles the wires at a fire?

A. The police pull them out of the road the best they know how, but they are afraid of them, as well as the firemen.

Q. Please mention just what the employees of the electrical bureau do with regard to wires belonging to other parties than the city of Philadelphia. I am now speaking of overhead wires.

A. We have a chief line-inspector who is constantly upon the street all over the city looking after lines, to see that they are in order, and that everybody uses proper care so far as safety is concerned, poles and wires, and where he comes across any poles that have decayed or any that is liable to be pulled down, or in a dangerous condition in any way, he reports to me, to the head of the office, and from me it is communicated to the parties interested, telephone, telegraph and electric light companies, to give the matter attention. Where it is urgent, we give it immediate attention

135 or as soon as possible, so as to avoid accidents. Our other men do the same way, and they report—our linemen, what we call pole-climbers. We have a great many complaints from citizens, of these housetop wires that have been placed upon their buildings without authority, some places, to go and cut them off. Others where they are cut and dangling over the fronts of buildings. We send out our linemen to remove those ends or whatever may be hanging over the buildings or dangerous in the street. In other words, to keep the street clear of all dangerous wires.

Adjourned until Thursday, April 18, at 10 a. m.

136 Copy.

EXHIBIT No. 1.

Statement covering the actual cost of maintenance and keeping in repair all owned and leased wires in the sixth district, eastern division, Western Union Telegraph Company, from 1885 to 1891, inclusive.

Year.	Date.	Between—	Actual cost. Number of miles wire.	Total am't cost.	Rate per ann.	Av. rate p'r an.
1885	June 30	All points in the district	31980.36	21307.15	1.33	
"	Dec. 31	" " "	33702.71	21640.76	1.28	
						1.30½
1886	June 30	" " "	33702.71	20494.44	1.22	
	Dec. 31	" " "	33711.31	23004.04	1.29	
						1.25½
1887	June 30	" " " ...	34006.31	24384.50	1.43	
	Dec. 31	" " "	34357.21	22375.50	1.30	
						1.36½
1888	June 30	" " " ...	40866.56	43772.04	2.14	
	Dec. 31	" " "	40866.56	30915.81	1.51	
						1.82½
1889	June 30	" " "	40872.67	48417.86	2.37	
	Dec. 31	" " "	40872.67	37687.63	1.84	
						2.10½
1890	June 30	" " "	39614.07	30159.02	1.53	
	Dec. 31	" " "	40034.98	27545.58	1.88	
						1.70½
1891	June 30	" " "	40024.48	37829.03	1.89	
	Dec. 31	" " " ...	40174.63	29241.62	1.45	
						1.67
		Average rate for 7 years	.....	.....	.....	1.60⅘

137 Copy.

EXHIBIT No. 2.

Amount of license charges for maintenance of poles and wires overhead for telegraph, telephone, and electric light purposes in the city of Philadelphia.

1885	$16,942.50
1886	16,587.00
1887	17,338.00
1888	16,464.50
1889	16,281.27
1890	16,902.50
1891	18,349.00
	$118,864.77.

138 Copy.

EXHIBIT No. 3.

Statement of the number of telegraph poles and miles of telegraph wire belonging to the city of Philadelphia erected and maintained in and over the streets thereof during the years following, to wit:

Years.	Number of poles.	Miles of wire.
1885	3686	538½
1886	3817	595
1887	4111	664½
1888	4649	795½
1889	5117	903¾
1890	5309	758
1891	5530	837¾

139 Copy.

EXHIBIT No. 4.

Statement of the salaries of the chief of electrical bureau of the city of Philadelphia and his assistants, clerks, linemen, etc., for the years hereinafter stated, as follows:

1885.

Salary of chief	$3,000.	
Salary of chief clerk	1,200.	
1 inspector	1,000.	
1 foreman	900.	
2 linemen	1,600.	
Keep, etc., of horse and wagon	400.	
		$8,100.

1886.

Salary of chief and chief clerk	$5,700.	
1 inspector		
1 foreman		
1 lineman		
Keep of horse	400.	
		6,100.

140 1887.

Salary of chief and chief clerk	$6,300.	
3 inspectors	3,000.	
1 foreman	900.	
5 linemen	4,000.	
Keep, etc., of horse and wagon	400.	
		14,600.

1888.

Salary of chief	$3,500.	
Salary of chief clerk	3,100.	

4 inspectors	4,000.	
1 foreman	900.	
6 linemen	4,800.	
Keep, etc., of horse and wagon (3 wagons)	500.	
		16,800.

1889.

Chief	$4,000.	
Manager and clerk	3,400.	
5 inspectors	5,400.	
1 foreman	900.	
6 linemen	4,800.	
Keep of horse and 3 wagons	500.	
		19,000.

141 1890.

Salary of chief	$4,000.	
Assistant and clerk	5,200.	
6 inspectors	6,480.	
1 foreman	900.	
7 lineman	5,600.	
Maintenance of horse and 3 wagons	500.	
		22,680.

1891.

Salary of chief	$4,000.	
Manager	2,500.	
Ass't manager	1,500.	
Clerk	1,500.	
Ass't clerk	800.	
Draughtsman	1,000.	
Six inspectors 1080 each	6,480.	
Foremen	900.	
7 linemen, $850 each	5,950.	
		24,630.

142 Second day.

PHILADELPHIA, PA., THURSDAY, *April* 18, 1901.

David R. Walker resumes stand.

Direct examination continued.

By Mr. MILLER:

Q. You were asked just before the close of yesterday's session to state "what the employees of the electrical bureau do with regard to wires belonging to other parties than the city of Philadelphia."

143 The question was asked as to overhead wires, and you answered this far when court adjourned: "We have a chief line inspector who is constantly upon the street all over the city, looking after lines, to see that they are in order, and that everybody uses proper care so far as safety is concerned, — poles and wires, and

where he comes across any poles that have decayed or any that is liable to be pulled down, or in a dangerous condition in any way, he reports to me, to the head of the office, and from me it is communicated to the parties interested, telephone, telegraph and electric light companies, to give the matter attention. Where it is urgent, we give it immediate attention, or as soon as possible, to avoid accidents. Our other men do the same way, and they report—our linemen, what we call pole-climbers. We have a great many complaints from citizens, of these housetop wires that have been placed upon their buildings without authority, some places, to go and cut them off. Others where they are cut and dangling over the fronts of buildings. We send out our linemen to remove those ends or whatever may be hanging over the buildings or dangerous in the street. In other words, to keep the street clear of all dangerous wires." Did you finish the answer to that question, or do any other duties of your men in your bureau, with regard to wires owned by other parties than the city, come to your recollection

144 now?

A. The bureau supervises the erection, construction and maintenance of all poles and wires, of any kind of electrical work upon the highways, supervises the construction and maintenance and see that they are kept in proper position and see that they are placed in the proper position, that is to say, with telegraph wires the rule of the department is that telegraph wires shall be above the electric light wires where it is possible to have it so. The electric light wires are not permitted over the top of other wires if it can be avoided.

Q. The object of that is what?

A. Safety, to prevent accidents.

Q. Which might happen otherwise in what way?

A. If those large wires, those electric light wires, are large, they are liable to sag down or fall upon a number of wires. They may catch half a dozen, and by which the current from this electric light wire would pass over on those lower wires, five or six or, a dozen, whatever it may be, or come in contact with. While in the other a single wire above would only take the current on one wire. That is the object of that, to have as little risk as we possibly can to life and danger of burning houses and property.

145 Q. Wherever it is possible to have the electrical wires suspended below the telegraph wires——

A. Telegraph and telephone—all wires. Also that we do not permit wires to run in between. See that the electric light wires do not run in between telegraph wires, or telegraph wires in between electric light wires, so as to remove all sources of danger so far as we possibly can. That is constantly going on all over the city.

Q. You are exerting yourself all over the city to prevent that?

A. Precisely, yes, sir.

Q. Are there any other duties that happen to come to your mind about that, that you are able to recall?

A. This general supervision of our linemen. Our chief line inspector with the linemen have all those instructions in so far as all

lines are concerned whether overhead or underground. It is a supervision, rules or regulations for which we formulate and print in book form, on construction and maintenance.

Q. Have you one of the books with you?

A. I have not just here. I did not bring one. I think I gave you one.

Q. You have that in book form?

146 A. Yes, sir; it is a small book that we have, a regular set of rules and regulations by which we govern this construction and maintenance of lines.

Q. Rules governing what?

A. The construction and maintenance of telegraph, telephone and electric light lines and trolley lines—on everything.

Q. Is that the book (handing witness book)?

A. Yes, sir.

Q. Was that printed as far back as 1891?

A. No, sir, that was only printed in recent years. It is virtually a copy of our rules and regulations ever since the electric light and trolley lines came into existence.

Q. You said in the early part of your testimony that there had been twenty-five to thirty accidents in the city from electrical wires. I think you said that was in this last year.

A. During the last year, 1900, we had about thirty accidents of different kinds.

Q. How did that number compare as nearly as you may be able to say, the average of accidents, since heavy-current wires were introduced by the city?

147 A. That was an excess of any other year.

Q. It was greater than any other year?

A. Yes, sir.

Q. Give the court and jury an idea of the frequency of accidents running back say to 1885.

A. We did not have scarcely a death, not more than one or two in a year, prior to 1900.

Q. Counting all kinds of accidents and injuries less than death and burning about how many would there be in the course of the year?

A. There would not be more than one or two prior to that—two or three.

Q. What are you speaking of?

A. Prior to about 1890, eight or ten years ago.

Q. You mean not more than one, two or three deaths?

A. Deaths.

Q. I mean including the other kind, burning.

A. There were a few, but I could not give you the number. I keep a record of those things too. Probably might have been half a dozen or one dozen burned, but no fatal accidents of any kind, more than one or two. We have passed over a year without any.

Q. How about injury to property?

A. We have had some of that kind. We had more of them a few

years ago than we have now. Where fire was set to by it, by incandescent light.

148 Q. Have you any connection with the board of highway supervisors?

A. I am a member of it.

Q. Have been how long?

A. One of the original members; about ten or twelve years ago.

Q. The duties of that board are what?

A. All applicants for the opening of the streets, the laying of any substructure of any kind, comes before that board for approval and authority to issue a permit.

By the COURT:

Q. When you say opening streets, you mean digging holes in them?

A. Yes, sir, digging the holes and the location of a structure in the street.

By Mr. MILLER:

Q. Does that apply to sidewalks?

A. Yes, sir, everything.

Q. The planting of a telegraph pole?

A. It has nothing to do with that part of the service. The board of highway supervisors has nothing to do with the overhead service.

Q. Are ordinances passed occasionally upon the subject of regulations of electrical poles and wires?

149 A. Ordinances are passed giving authority to parties, which will be subject to the ordinances in force or thereafter passed.

Q. That is, ordinances of special permission?

A. Yes, sir.

Q. To companies to construct their lines in the city?

A. Yes, sir, there was a general ordinance passed in 1882, requiring all overhead wires to be placed underground by the first of January—I believe I am right—1885, but three years was the time. Just about the time that this privilege expired, by resolution of councils, the chief of the electrical bureau was directed to suspend operations.

Q. To suspend what operations?

A. Not to put it in force.

Q. Not to remove the wires?

A. No, sir, not to remove them.

Q. How many wires were there overhead at that time?

A. I could not tell you without referring to my reports.

Q. There were a great many of them?

A. There was a great many. Some places there was 100 in position; some places not over two or three or five or ten.

Q. At that time in 1882 this ordinance that has been offered

150 in evidence of 1881, putting a charge of one dollar a pole on poles had been passed, of course?

A. Yes, sir.

Q. In 1883 the ordinance imposing charges on wires overhead had been passed?

A. I think that is about it.

Q. Whatever the date was?

A. Within one or two years of that.

Q. Councils having passed a resolution in 1885, put off the final step requiring all overhead wires to go underground, what did they do in 1886, bearing upon the question of overhead or underground wires?

A. The ordinance of August 5, 1886, required that parties putting underground wires should furnish the city with one tube or duct for the use of the city.

Q. What was done in 1886 about charges on the underground wires?

A. The charges, where they were put underground, were removed, as an inducement to have the wires placed underground, and the only requirement was, that whoever did it should supply the city or furnish the city with one duct or chamber for the use of the city. There was no other charges connected with it. It was to remove all license charges, to have them place their wires underground.

Q. There is a conduit charge. There was then a conduit charge?

151 A. There was, but it was removed. There was a charge originally on underground wires as well as overhead. That was all removed by ordinance of council.

Q. You are speaking now of the mileage charge?

A. Yes, sir, on conduits and wires also.

Q. What I would like to know is, whether there was not at that time, after that ordinance, a charge per foot or conduit?

A. Yes, sir, there was one.

Q. Was that removed in 1886?

A. That was removed, I do not know in what year, but it was removed about that time.

Q. There is no such charge now?

A. None whatever.

Q. Wires underground are free?

A. Yes, sir.

Q. So far as any charge against the wires or the conduits is concerned?

A. Yes, sir.

Q. What was the object of these changes, imposing a charge on overhead wires, and the removal of charges from underground wires?

A. As an inducement for them to place their wires underground. To remove them from this danger of overhead construction and the accumulation of dangerous wires.

152 Cross-examination.

By Mr. PETTIT:

Q. You have always been a great advocate of the underground system, have you not?

A. I have.

Q. And you have carried on in this city a system of underground electrical communication more extensive than anywhere else, have you not?

A. So far as I know, yes, sir.

Q. Under your administration you have built for the city a great many miles of electrical underground conduits, have you not?

A. Yes, sir.

Q. About how many miles have you now?

A. There is about over two million feet, I think it is, of the city's.

Q. Belonging to the city?

A. And there is about twenty-one million feet of underground conduits in the city of Philadelphia.

Q. How many feet belong to the city?

A. About two million.

Q. When did you commence the building of those lines?

A. In 1886.

Q. I notice that in the general expenses of your office including the salary of the chief and his chief clerk, inspector, foreman,
153 linemen, a horse and wagon which were used to drive about with, that 1887 increased forty per cent. Was that about the time that you commenced this building for the city?

A. What year?

Q. Between 1886 and 1887.

A. That is about the time we commenced to put wires underground.

Q. The city rents those conduits, does it not?

A. Yes, sir, wherever they have it to spare, as an inducement to them to put their wires under.

Q. When you are speaking of charges, you did not include this rental by the city of its own conduits?

A. Not at all. The city does not rent conduits that are furnished by other parties. Only their own by which the city is paid for the construction of placing them there.

Q. Out of the twenty-one million feet, nineteen million feet, about, are owned by other parties and the city has a private duct in them?

A. No, sir, they are owned absolutely by the city, every foot of them. I mean the two million feet.

Q. You did not catch my question. If I understand it the city owns two million feet of conduit, about?

A. Yes, sir, a little more or less.

Q. And that they rent out to people that choose to use them?

154 A. Such as they have to spare, yes, sir.

Q. What they have to spare?

A. Yes, sir.

Q. And you derive quite a revenue from it?

A. We charge ten dollars per annum—we rent wires also—ten dollars per annum per mile of one wire. For a duct three hundred dollars for the first mile, two hundred and fifty dollars for the second mile, and two hundred dollars for the third, for any going down—an average of two hundred and fifty dollars per mile where three miles is occupied.

Q. Can you give me any idea as to the total revenue last year by the city from the rent of its own ducts?

—. ——.

Q. It is in your report, is it not?

A. Yes, sir.

Q. Have you your report here?

A. I have, yes, sir.

Q. Let me see your last printed report. 1899 is the last printed report?

A. I have 1900 there (producing book). That has not been printed in book form. It is in the hands of the printer.

Q. Has this in it the statistics about your rental?

A. Yes, you can find them there from each different company.

155 Q. This busines of building ducts, as you say, commenced in about 1886 and has been constantly prosecuted ever since, year by year?

A. Yes, sir.

Q. And with the revenues of the department the expenses of the department have increased, have they not, necessarily?

A. As our extensions our whole service increases, both in labor and general expense and outlay.

Q. How many poles has the city in the streets at this time?

A. I think in the neighborhood of five thousand. I can tell exactly by that report.

Q. What are they used for?

A. For all kinds of electrical service other than trolley.

Q. How many electric lights have you in the city?

A. We have 8,607. We will have over nine thousand in a few days.

Q. As a rule does the city have anything to do with the poles on which those lights are?

A. Yes, sir.

Q. What is that?

A. The supervision of their construction and maintenance.

Q. Does the city own the poles or does the lighting company own them?

A. The lighting companies own their own poles. They
156 have poles of their own, as well as use the city's and telegraph company's poles wherever they can get on without the erection of poles.

Q. The electric light companies use their own poles?

A. Yes, sir.

Q. And city poles?

A. Yes, sir.

Q. And also sometimes telegraph poles, do they?

A. Yes, sir, where they can get permission to use them.

Q. And the whole business makes about as many lights as you said?

A. Covers that lighting territory, underground and overhead.

Q. Those lights, however, that are on the telegraph poles, are public lights, are they not?

A. They are.

Q. You do not allow private lights on those poles?

A. I do not know of any.

Q. According to your reports I see that the number of poles belonging to the city in 1885 was 3686 and by 1891 it had increased to 5,530?

A. That is about it.

Q. Can you tell generally what that increase of two thousand poles was for. Was it police purposes or electric lighting or what?

A. Of the city?

157 Q. Yes, sir.

A. For the extension of the city service, telegraph, telephone and fire.

Q. Of the city's own service, telegraph and telephone?

A. Yes, sir.

Q. That telegraph service includes lines of telegraph from where to where?

A. From city hall through the entire city to points in every direction.

Q. That means all the police stations?

A. Yes, sir, fire stations.

Q. And fire stations?

A. Yes, sir, police, patrol service and highways.

Q. Police-patrol boxes?

A. Yes, sir.

Q. And the fire-boxes?

A. Yes, sir, and telephone service of the city to the different institutions, hospitals &c.

Q. And all that work and all those lines are supervised, and were supervised, by the office force of your department, were they not?

A. By the employees of the department, people who were permanent as well as those who were temporarily engaged.

Q. In respect to the granting of permits to these telegraph companies, is there any man or boy about your place that you

158 can dispense with if you did not have those permits to grant?

A. No, sir, we are very much crippled for help as it is. Our force is too small.

Q. Prior to the introduction of the electric light in Philadelphia was there any danger from telegraph wires?

A. Yes, sir.

Q. In what?

A. That they would sag down or break down across the highways or on roofs where they went; of people coming in contact with them and being injured, and trip and fall off of the roof of the house, or animals in the streets being cut on their legs, and everybody else.

Q. The danger was the same as that would be from any other kind of wire?

A. Yes, sir.

Q. It had no electrical danger?

A. No, sir.

Q. About when was it that the electric lights were introduced in the city to any extent beyond the mere experiment?

A. In 1882, I believe, we located this line on Chestnut street, which was the first.

Q. That was the first line, along Chestnut street, built by the Brush Company?

A. Yes, sir, the Brush Company built a line of forty-nine lights on Chestnut street from the River Delaware to the River
159 Schuylkill, and furnished the lights free of cost for one year, forty-nine lights, so as to show the city it was feasible, and with the view of getting the experience.

Q. That was the time that the camel put his head in the tent?

A. Yes, sir.

Q. Those wires, you say, you always direct to be placed under the telegraph wires?

A. So far as possible, yes, sir.

Q. The trolley lines were introduced when?

A. I cannot tell you just exactly unless I look at the book.

Q. You do not remember?

A. No, sir.

Q. About?

A. I judge the trolley has been in service ten years or eight years.

Q. It was while Mayor Stuart was mayor, was it not?

A. Yes, sir, Mayor Fitler and Mayor Stuart together, about eight or ten years ago.

Q. About six years ago?

A. I guess I am pretty near right.

Q. What is the effect of wires coming in contact with trolley wires? Are they or not dangerous?

A. Very dangerous. The burning capacity is much greater.

Q. All the danger arising electrically from telegraph wires
160 has come since the introduction of these new things, this light and trolleys?

A. So far as shock is concerned, yes, sir.

Q. The telephone wires do not shock anybody, do they?

A. They will if they get a current, I think. They are as dangerous as any other where they come in contact with an electric wire.

Q. Without that?

A. No, sir.

Q. That proves the telephone is perfectly harmless?

A. Perfectly, yes, sir. The ordinance of councils authorized the construction of trolleys in this city under the supervision and direc-

tion of the electrical bureau. It did not say their wires should go underground or overhead particularly, and the department took the position, construed the ordinance to mean that they could make them put them underground or overhead—their feed-wires—and I took that position, that they should bury their feed-wires, as they were unsafe overhead, and the companies complied with that demand or request, and they have been all put underground with the exception of one, two or three locations, such as Lancaster avenue west of Thirty-third street, and out on towards Willow Grove, and on the York pike, about Nicetown lane, and one or two other places outside of the city; but no overhead feed-wires are suspended within the immediate center of the city.

Q. The wire from which the trolley is attached necessarily has to be exposed?

161 A. Yes, sir.

Q. And is uninsulated?

A. Yes, sir, it is not insulated.

Q. In the operation of your lines that belong to the city, about how many miles of wire do you operate?

A. We have about sixteen hundred miles, I think, fifteen hundred or sixteen hundred miles overhead in the suburbs. We have about twenty-five hundred or three thousand miles of wire underground. In all, in the city of Philadelphia there is about 75,000 miles of wire, trolley telegraph, telephone, electric light, overhead and underground.

By a JUROR:

Q. Do you mean 7,500 or 75,000?

A. 75,000.

By Mr. PETTIT:

Q. If the wire gets out of order, gets weakened or rusted—I am speaking about an overhead wire—is or is not that detected by the galvanometer?

A. Yes, sir.

Q. And underground wires, of course you can have no other means of detecting the weakness except by the galvanometer?

A. That is right.

Q. In these cases of accidents resulting in death or fire, where has the current come from that produced either the fire or the death?

162 A. Either from electric light or trolley currents.

Q. Can you remember any of those incidents in which it was communicated by a telegraph wire? I am not speaking now about the crossings of a roof, falling on a roof or anything of that kind, but where it came by communication from the telegraph wire.

A. We have had them, yes, sir.

Q. Which one?

A. We had them on Ridge road and most everything there up that way. We have had a number. I have them all on record.

Q. You have had a particular incident?

A. Yes, sir, where the wires fell upon buildings, on top of the buildings, or on the side of buildings, and at the same time a distance off had fallen upon a trolley or electric light wire, and it was communicated to that building where this telegraph wire would be laid or badly protected, or insulated, commonly called, on that building, leading down the spout, it would go into the spout or a fire-escape. Anything which was a metallic substance would be the conductor of electricity.

Q. In that case it was a telegraph wire which carried the current into the building and produced the fire?

A. Yes, sir, it will do it in the office. Will set the instrument on fire.

163 Q. Is there any other instance out of the thirty which you can think of in which a telegraph wire was the means of communication?

A. It was only partially so—the extension of the current from the trolley or electric light. The telegraph wire would be the terminal. But not of themselves. I have them on record, but I cannot at this time just recall the particular case. We have had them.

Q. Do you think of any other instance in the city of the twenty or thirty, in which there was a telegraph wire played a part? I am not speaking about the roofs, or light wire falling on the gutter, or anything of that sort.

A. I cannot, at this short notice, recall those things without reference to my data. That is in the hands of our men who have charge of the details of the office.

Q. You spoke about the ordinances. Have there been any general ordinances that you think of or remember I mean ordinances providing for the general regulation of either overhead or underground wires, either for telegraph or electric light purposes, other than the three that have been given in evidence, imposing those charges, and the one you spoke of, the action on which was suspended?

A. All ordinances put the general supervision, care and control under the electrical bureau.

164 Q. The ordinances that are passed by councils from time to time, relate exclusively to the one company or to the one person that are mentioned therein?

A. Yes, sir, and subject to ordinances then in force.

Q. Subject to the general ordinance?

A. Yes, sir.

Q. I am speaking now about general ordinances. Has the city seen occasion to change its general regulation for many years?

A. No, sir.

Redirect examination.

By Mr. MILLER:

Q. What proportion of the city's wires are under ground? You may possibly have answered that question, but I did not hear it.

A. I think it is about, as near as I can tell, about two-thirds.

Q. What has been the progress since 1885? Has it been in the direction of increasing or reducing the number of wires under ground?

A. We put everything under ground we can. We have diminished the overhead as far as we can, and increased the underground.

Q. As a matter of fact, has any considerable quantity of wire been put under ground since 1885 by the city? I mean its own wires.

A. We put everything under ground we can. We have, as I say, about 2500 miles of wire underground, to 1600 overhead, in
165 localities we cannot reach. I think the cost of maintenance of a wire under ground is probably not a dollar a year per mile. Over head will run anywheres from ten to twenty.

Q. How much wire had you under ground in 1885?

A. We had none worth speaking of. It was my first attempt to place wires under ground, which was on Broad street, from Columbia avenue to Lehigh, in 1886.

Q. How much wire had you under ground in 1891?

A. I cannot tell you that without referring to my records.

Q. Can you approximate it?

A. I cannot; I would not like to. We were putting it down all over since.

Q. Can you, by looking at the report for 1892, tell us how much you had under ground about that time (handing witness book)?

A. Under ground the city had 369 miles of telegraph and telephone wires.

Q. In what year?

A. In 1892.

Q. Now you have 2500, I think you said.

A. I can tell you exactly by looking at my data there.

Q. I mean only the wires owned by the city.

A. Telegraph and telephone wires, this is all the wires under ground I will give you first.
166 The telegraph and telephone wires under ground is 61.832 miles. The overhead wires is 11.155 miles, trolley, electric light, telegraph and telephone company. A grand total of 74,376 miles of wire in the city, of which the city has overhead 2010 miles of electric light wire. Overhead trolley wires, 674 miles; underground, 981 miles. The city has 50 miles of electric light wire underground. It has 1613 miles of overhead wire, and, it has 3533 miles of wire under ground, in place of 2500.

Q. How many messages can be sent over a single wire at the same time?

A. I cannot answer that question. Mr. Gill can answer that better than I can. A number can be sent over.

Recross-examination.

By Mr. PETTIT:

Q. You have here put together in your statement of overhead and underground wires, the telephone and telegraph wires?
A. Yes, sir.
Q. Have you any knowledge as to how much of it is telegraph and how much of it is telephone?
A. I can tell exactly if I should refer to my records.
Q. Could you tell by your report?
A. I could by my report.
Q. Your annual report?
A. Yes, sir, it is in there.
167 Q. I will show you your report for 1899. I mean the difference between telegraph and telephone. The telephone is very much the larger part?
A. Yes, sir, the telephone. I would have to subtract.
Q. I would like to know whether you have that there?
A. The Bell Telephone Company had, in 1899, wires on buildings and fixtures, 1564 miles. They had a mileage of wire on poles, returned of 4721 miles. Miles of their wire on city poles, 68 miles. They had underground—do you wish that?
Q. No, sir, I do not care about that.
A. They had 44,000 miles.
Q. That would be 1564, 4721 and 68, making 6353?
A. I made a mistake there, 34 in place of 68, making 6321 miles.
Q. That would be 6319 miles out of the 8740 miles total overhead, that you have put on your written statement?
A. You make a mistake. It is 6321 miles.
Q. 6321 miles of that 8470 miles was telephone wire?
A. Yes, sir.

DANIEL J. MCNAMARA, having been duly sworn, was examined as follows:

By Mr. MILLER:

Q. Have you any connection with the electrical bureau?
A. Yes, sir, chief line inspector.
168 Q. How many line inspectors are there?
A. There are eight linemen. I think there are eight inspectors.
Q. Sixteen in all?
A. Yes, sir.
Q. Do you have anything to do with looking out for danger from wires in the city?
A. Yes, sir.
Q. I wish you would mention some of the accidents that you have known particularly between 1885 and 1891, if you are able to mention one occurring about that time, so as to give the court and jury an idea of the extent of danger from electric wires overhead in the city.

A. From 1885 to 1891?
A. Were you connected with the bureau at that time?
A. Yes, sir; I do not know that I can recall any fatal accidents between those years.

By the COURT:

Q. Accidents of any kind.
A. There were quite a number of accidents, but I could not call them to mind now. They are happening every day, more or less.

By Mr. MILLER:

Q. Were they happening more or less frequently between 1885 and 1891?
A. Yes, sir.
Q. More or less frequently?
169 A. Less frequently then than now.
Q. How does the number of wires compare now with the number of wires then? Are there more or less wires now than then?
A. I do not know that there is much difference. There is a large number goes under ground. There is quite a large number overhead. There is more uses of wires now than that time, telephone wires especially.

(No cross-examination.)

EDWARD A. WATERS, having been duly sworn, was examined as follows.

By Mr. MILLER:

Q. What is your position?
A. Assistant to the chief engineer of bureau of fire.
Q. Where is the chief engineer. Is he here?
A. He is sick. He has been laid up for near four weeks.
Q. Do you go to fires?
A. Yes, sir.
Q. For what length of time have you been accustomed to go to fires?
A. I have been going to fires since 1874.
Q. Are you or are you not acting chief now?
A. Acting chief, yes, sir.
Q. Have been how long?
A. For this last four weeks.
170 Q. Did you observe the effect of electrical wires overhead on the work of firemen?
A. Yes, sir.
Q. Is there any interference from that cause in the work of putting out fires?
A. Yes, sir, very frequently.
Q. Can you speak of instances?

A. Yes, sir, only last Monday night we had a fire at Passyunk avenue, above Catharine, and had quite a time with our ladders, getting them up. In fact, the men refused to go up the ladder on account of the wires, until we had the current cut off from the arc electric light wires.

Q. What is generally done at such a time?

A. I generally hunt up a lineman and get him to telephone to the company and cut that current off.

Q. What linemen do you send for?

A. Any one I can see on the ground. It does not make any difference whether it was the electric or any other company; any one I see there.

Q. Is there any difference in the unwillingness of the firemen to go up the ladder whether the wires are telegraph wires or electric light wires?

A. Yes, sir. They won't go up if they know there is any danger.

171 Q. Do they know the difference, so they will handle telegraph wires readily and will not handle electrical wires?

A. Yes, sir, they know the difference.

Q. Suppose there were only telegraph wires, is there any interference?

A. Interference in getting up the ladders, yes, sir; that is, to the higher stories. Of course we can work the lower stories without any trouble. We can go under the wires handier with our ladders, but when it comes to reaching the upper stories, we cannot get these ladders under them.

Cross-examination.

By Mr. PETTIT:

Q. In the center of the city, where the big buildings are, the wires have been pretty generally removed, have they not?

A. A great many of them, yes, sir.

Q. I mean telegraph wires.

A. Yes, sir.

Q. Only the electric light left?

A. Yes, sir.

Redirect examination.

By Mr. MILLER:

Q. How about the roofs of houses, is there any trouble from wires there?

172 A. Yes, sir, often at night. Not so much through the day, when we can see them, but at night when we do not see them.

Q. Firemen have to climb over the roofs of houses, of course?

A. Yes, sir.

Q. What is the condition of a fireman's clothing, generally, as to the liability of electricity passing on to their bodies?

A. Generally wet.

Q. And that makes the electricity more likely to run over their bodies?

A. Yes, sir.

Mr. MILLER: By agreement of counsel I read the testimony of William B. Marks. I understand this testimony, and also the testimony of Abraham M. Beitler read yesterday, are read under the agreement that if these witnesses were called at this trial, they would testify in the terms of their former testimony.

(Testimony read, as follows:)

173 WILLIAM D. MARKS, having been duly sworn, was examined as follows:

By Mr. MILLER:

Q. What is your occupation or profession?

A. That of electrician and engineer.

Q. How long have you been in that occupation?

A. As electrician since 1878, when I made the acquaintance of Edison. Since that time I have held the professorship of dynamics at the University of Pennsylvania; I also was superintendent of the Franklin Institute electrical exhibition, president of the Edison Electric Light Company of Philadelphia, and engineer of it at the same time, and president of the American Electric Heater Company and of the General Electric Automobile Company.

Q. What is the Edison Electric Light Company?

A. It is a station with about one hundred and fifty thousand incandescent light capacity, situated near the corner of Ninth and Sansom streets, having several hundred miles of copper wire attached to it under ground.

Q. In the course of your work as an electrician have you had an opportunity of judging the advantages and disadvantages in point of safety and in point of expense of overhead and underground wires?

174 A. It has been uniformly the case that where wires have been put under ground, their safety, except when being repaired by skilled employees, might be called absolute. Although the first expense of putting the wires under ground is great, in the long run it becomes cheaper, because of the absence of the continual breakages due to the action of the elements, the rotting of the poles, wind, sleet storms and all the various things that combine to bring down wires strung in the air.

Q. You speak of the safety of wires under ground as being absolute so far as the public are concerned. Is it possible to maintain wires overhead absolutely safe?

A. I do not think so.

Q. Is it practicable to protect the public in the fullest degree against the dangers of overhead wires by a system of repairs under which a man does not go out on the line until the stoppage of the current shows a defect?

A. It is quite impossible to do so.

Q. What is the best practicable system to avoid accidents from an overhead wire?

A. Constant personal vigilance of inspectors anticipating any possibility of breakage by careful inspection.

Q. That is, going ahead of notice of any defect and look-
175 ing out for signs of danger that there will be a stoppage?

A. Yes, sir.

Q. Are you able to tell the court and jury how far it is practicable for a police force, each member of which has a certain district or beat assigned to him for his daily patrolling, to be of service in guarding against dangers from overhead wires?

A. That would depend largely on the amount of time left to a policeman from his other duties, if they took the precedence. It is not difficult to instruct any man of average intelligence in the signs of breakdown of overhead wires; that is, the ordinary signs. The question of insulation on high-tension wires remaining there, is one that a man with a good pair of eyes would soon learn to judge of—not, perhaps, infallibly. The question of uninsulated wires, like the telegraph wires, is not so easy. It would be quite difficult for a man who could not mount the poles to satisfy himself, except in very obvious cases of very great sag or of actual breakage.

Q. I understand that in the case of insulated wires a defective condition of the wire is apparent from the street?

176 A. A defective condition of the wire is very easily apparent in case the insulation is looked after.

Q. But if a telegraph or telephone wire which has no cover is rusted, that would not be possible from the footway on the street?

A. Or if it had diminished in diameter by rusting and scaling, you could not tell without very close inspection.

Q. If it were out of place?

A. You could tell it instantly.

Q. Or if a skin wire or some other wire that had no business there had been rigged up close to it?

A. You could tell that at once. Pardon me if I explain that with two wires hung side by side, crosswise to each other, there may be said to be two chances of breakage or contact. With three wires, any one of them may break, making three chances of breakage, and any one of them may possibly fall across the other two, so that with three wires there is six times the chance of trouble that there is with two wires. As the number goes on increasing, the number of chances of breakage and accidental contact becomes almost uncountable. You cannot tell in how many different ways a large number of wires may create trouble.

Q. Is, or is not, accident from a stray current, or in some
177 such way, a common thing in municipalities in modern times?

A. I have not kept accurate memoranda of that, but I should say that it is a very common thing.

Q. Is the danger of such accident limited to the city where the contact or crossing occurs?

A. That depends entirely on where the wire that crosses leads to. It might be one hundred miles away, or more than one hundred miles away.

Q. A telegraph wire might cross an electric light wire in New York, and if the conditions between were not such as to forbid, it might kill somebody in Philadelphia?

A. Or make a fire in Philadelphia.

Q. What are the conditions that would be likely to prevent that? Are there such conditions in general use?

A. A great many precautions have been taken simply because of those accidents. The use of fuses, the uses of automatic cut-outs, which fly out and break the contact; but, even in spite of that, there are still occasional accidents—and serious ones—both as a matter of fire and as a matter of injury to individuals, if not actual death.

Q. Is it usual to have groundings at all stations?

A. Yes, sir.

Q. Does a grounding necessarily prevent the danger of such a current and overcharge passing to a great distance?

A. That is a matter where personal care and vigilance enters in. It is to be presumed that if those in charge of a station or an
178 office attend strictly to their work, and never make a mistake, that there will be no trouble, but that is not true.

Q. Are there, or are there not, well-authenticated cases of injuries occurring in one city from a current getting astray in another?

A. I could not say in that case. I only speak of one instance that I heard of, where the Philadelphia Edison Company was accused of having sent a current to Rochester. Of course, it was a low-tension current, and the question was a quarrel amongst wiremen who carried wires up inside of a railway station and in some way or another got them accidentally across the telephone wires.

(Cross-examination.)

By Mr. PETTIT:

Q. You say you never knew of but one instance where this was supposed to have happened, and that was where the current originated in Philadelphia and was discovered in Rochester?

A. It was accused.

Q. What kind of a current was it?

A. It was a two hundred and twenty volt current.

Q. For what purpose?

A. It was used for incandescent lighting.

Q. In speaking of these accidents, which you have been talking about, you have included the whole country, have you not?

179 A. Yes, sir.

Q. Your observations are made up of everything that took place in the United States so far as you know?

A. From daily reading of the newspapers.

Q. Where this Rochester incident occurred, was it your company that it was supposed to have originated with?

A. It was stated that some wireman connected with the company had carried wires in such a way as to interfere with the telegraph operations. He vigorously denied it.

Q. Your wires are all underground, are they not?

A. This was carried up inside of the house.

Q. Are underground wires practically in use anywhere except where there is a large number of wires bunched together so that the expenses of the conduit will not be too exorbitant?

A. All of the war telegraph wires used in Germany now are placed underground for the purpose of avoiding the possibility of breaking down at a critical moment.

Q. They are hidden from public view too, are they not?

A. They are also hidden as well as can be. Of course *there* cannot be hidden entirely.

Q. In this country, as a commercial operation, where we do not have wars all the time, do they put wires underground, except where *they* are a large number collected?

A. Very rarely.

180 *Defendant's Evidence in Rebuttal.*

Mr. Pettit offers in evidence the form of the report made by the police officers, mentioned in Judge Beitler's testimony.

(Marked "Exhibit 5.")

Mr. Pettit also offers in evidence the rules and regulations of the electrical bureau, identified by Chief Walker.

(Marked "Exhibit 6, April 18, 1901, M. F. M.")

Also the statement of the miles of overhead and underground wires of the city of Philadelphia in 1901, identified by Chief Walker and referred to in his testimony.

(Marked "Exhibit 7, April 18, 1901, M. F. M.")

Mr. PETTIT: I believe that I accidentally omitted to put in the acceptance by the Western Union Telegraph Company of the act of Congress of July, 1866. I thought I had put it in. I now offer that, dated June 5, 1867. I offer a certified copy thereof; the acceptance dated June 5, 1867, and the certificate of the Postmaster General as to the accuracy of the copy, being dated June 30, 1884.

Also the circular of the Postmaster General, fixing the Government rates to be paid for messages transmitted by the Western Union Company.

181 Mr. PETTIT: Since the adjournment I have obtained a printed copy of the department's report for the year 1890. I desire to read the statements therein about permits, to complete the record in that regard. I read from page 57 of that report:

"Permits.—The following will show the number of permits issued to each company and the purpose for which they were granted." Then follows a tabulated statement showing that there were thirty-five permits granted for the renewal of poles, 86 permits granted for the erection of new poles and posts, 105 permits granted for the

running of new wire, 107 permits granted for the repairs to and renewals of wire, 3 permits granted for the removal of poles; making a total of 336 permits, being an increase of 47 over last year. And at the same time the following will show the number of permits issued to each company, and the purpose for which they were intended, for underground purposes. Followed by a tabulated statement showing 99 permits granted for repairs, 248 permits granted for a new house connection, 97 permits granted for new work on the main leads, and that the Penn Electric Light Company received permits for the construction of two new manholes and for the changing of one, making a total of 447 permits issued for underground work. A decrease of 503 from the number issued in 1889.

Testimony closed.

182 Copy.

EXHIBIT No. 5.

Department of public safety.

Robert J. Linden, superintendent of police.

PHILADELPHIA, —— —, 189-.

Report of officer —— No. —, —— district, on pavements, curbs, gutters, roadways, posts, trees, and other structures on the highways out of repair or dangerous.

.....

.....

.....

.....

.....

NOTE.—Everything which requires repair should be noted, such as decaying trees, leaning telegraph poles, detached, broken or sagging wires, swinging signs with broken supports, awning posts broken, stumps of trees or trees in the middle of the pavement, or trees the roots of which make the footwalk dangerous, broken inlet tops or manhole covers, etc.

183 Copy.

EXHIBIT No. 6.

Rules and regulations of the department of public safety, electrical bureau, for the construction and maintenance of telegraph, telephone, electric light and trolley lines and underground electrical service in the city of Philadelphia.

Article 1. No pole or wire will be permitted to be erected over, along or across the highway, without a permit from the electrical bureau.

Article 2. The placing of poles on the highway without having first been inspected by the electrical bureau will not be permitted

Article 3. Telegraph, telephone, electric light and terminal poles to be of straight, sound chestnut, locust or pine timber, neatly dressed before being erected, and not less than forty (40) feet in length, eight (8) inches in diameter at the top, well proportioned; or of iron, not less than five (5) inches in diameter at the top and eight (8) inches at the surface of the pavement, set twelve (12) inches back from the face of the curb, and not less than five (5) feet in the ground, and subject to inspection and approval by the electrical bureau before being erected. Upper gain or space on telegraph, telephone and electric light poles to be reserved for city use.

184 Article 4. Trolley poles to be not less than twenty-seven (27) feet long, six (6) inches in diameter at the top, eight (8) inches in diameter at the surface of the pavement, and not less than five (5) feet in the ground.

Article 5. Location of all poles in the highways, and size and length of poles must be approved by the electrical bureau before the street or pavement is broken or pole erected.

Article 6. All pavements broken for the erection of poles or for the purpose of connecting therewith, must be repaired immediately upon the completion of the work.

Article 7. Erection of wooden poles in the streets where the footwalk is less than six (6) feet in width, will not be approved.

Article 8. The erection of poles of a greater diameter than twelve (12) inches at the surface of a footwalk six (6) feet in width, will not be approved.

Article 9. Footwalk of eight (8) feet in width, pole not to exceed fourteen (14) inches in diameter at the surface of the pavement.

Article 10. Footwalk of ten (10) feet in width, pole not to exceed fifteen (15) inches in diameter at the surface of the pavement.

185 Article 11. Footwalk of twelve (12) feet in width, pole not to exceed sixteen (16) inches in diameter at the surface of the pavement.

Article 12. Footwalk of fifteen (15) feet or more in width, pole not to exceed eighteen (18) inches in diameter at the surface of the pavement.

Article 13. Telegraph, telephone and electric light wires to be suspended and maintained not less than twenty (20) feet above the pavement, and not less than twenty-five (25) feet at all street crossings and intersections.

Article 14. No telegraph or telephone wire will be permitted to be suspended or maintained through or between electric light wires nor electric light wires be permitted to be suspended or maintained through or between telephone or telegraph wires, unless thoroughly insulated and secured to a proper support on a pole. In all cases telegraph and telephone wires, where they cross electric light wires, must, to prevent accident, be suspended and maintained not less than four (4) feet apart.

Article 15. Electric light wires to be erected and main-
186 tained across the street at not less than four (4) feet under all telegraph and telephone wires, to prevent accident.

Feed-wires, where authorized, shall be suspended and maintained

not less than twenty (20) feet above the pavement, and at street crossings or intersections, not less than twenty-five (25) feet above the street.

Article 16. Trolley wires shall be suspended not less than twenty (20) feet above the street pavement, and maintained not less than eighteen (18) feet above the roadway, and kept thoroughly insulated to prevent current escaping to the poles. At steam railroad crossings said wires are to be suspended and maintained not less than twenty-two (22) feet above the roadway.

Article 17. To prevent accident, dead or unsafe wires shall be removed from along or across the highways by the party or parties causing the same to be erected.

Article 18. In all cases poles to be erected and maintained not less than four (4) feet from fire-plugs and gas lamps.

Article 19. Head guys or stay-wires must be attached to the poles when the electrical bureau deems it necessary for the proper maintenance and safety. Guard-wires shall be erected and maintained at such places as shall be directed by the electrical bureau.

187 Article 20. Poles being removed from the highways shall be dug out and the pavement properly repaired.

Underground.

Article 21. To avoid accident or tampering with underground cables, conduits and manholes in the highways by unauthorized persons, a permit must be obtained from the electrical bureau authorizing the opening of manholes for repairs and for the drawing in or out of cables.

Article 22. Constructions of all conduits, manholes and connections thereto must be approved by the electrical bureau before being placed in the street.

Terminal poles.

Article 23. No permit for terminal poles will be granted unless the same are fed by an underground system, and where surrounding conditions would warrant its use.

Article 24. No permit for the erection of a terminal pole will be issued, for the distribution of telephone wires to a high building or series of connected high buildings. Such buildings will have to be supplied through an underground conduit entering the same.

Article 25. No permit for the erection of terminal poles will be granted when another device can be better substituted.

188 Article 26. These rules and regulations are subject to such changes and modifications as may be deemed necessary by the department.

DAVID R. WALKER,
Chief of Electrical Bureau.

Approved.
ABRAHAM L. ENGLISH,
Director of the Department of Public Safety.

189 EXHIBIT No. 7.

Copy.

Overhead and Underground Wires.

PHILADELPHIA, *April* 17, 1901.

Trolley miles.		E. L. miles.		Telp. & telg. miles.	
Over.	Under.	Over.	Under.	Over.	Under.
674.64	981.78	2010.44	356.62	6856.80	5<299.04
	City	.....	50.1	1613.32	3533.26
674.64	981.78	2010.44	406.72	8470.12	61832.30

	Miles overhead.	Miles underground.
Trolley	674.64	981.78
Electric light	2010.44	406.72
Telegraph & telephone	8470.12	61832.30
Total.....	11155.20	63220.80
Grand total.....	.....	74,376 miles.

190 And thereupon the learned judge before whom the cause was tried instructed the jury as follows:

GENTLEMEN OF THE JURY: The first two points of the defendant request me to say: "This is an action by the City of Philadelphia to recover from the Atlantic and Pacific Telegraph Company certain charges imposed by two ordinances, to wit, one approved January 6th, 1881, imposing a charge of one dollar per annum per pole upon the telegraph poles of said company, and the other approved March 30, 1883, imposing a charge of two dollars and fifty cents per annum per mile of telegraph wire belonging to said company within the limits of the city of Philadelphia."

191 It is also true that "the uncontradicted evidence shows that the poles and wires of the Atlantic and Pacific Telegraph Company are lawfully erected and maintained in the streets of Philadelphia, for the transaction of commerce between the States (among other purposes) and such poles and wires are therefore lawful structures and not to be in any way considered as nuisances." And it is further true that no penalty is to be imposed by the city for the maintenance of the same.

We instruct you to render a verdict in favor of the plaintiff, The City, for the full amount of its claim. In brief, my reason for giving you that instruction is this. This is the second trial of this case. Upon the first trial, the question was submitted to the jury, whether

or not these charges were unreasonable, the trial judge explaining that that was a question of fact raised by the evidence, and therefore to be determined by the jury. The jury that considered that case found that the charges were unreasonable to a certain extent, and found a verdict in favor of the city for a portion of its claim. The case was appealed to the circuit court of appeals for this circuit, and they decided that there had not been sufficient evidence offered to go to the jury in support of the defendant's claim that the
192 charges were unreasonable, and therefore that the jury ought to have been instructed in that case to find in favor of the city for the full amount of its claim. The case was sent back for another trial, of course affording the defendant an opportunity to offer other evidence upon that subject if it was within the defendant's power.

Now, we have had that trial, and, while the evidence is not identical with that which was offered upon the first trial, it is, in my judgement, substantially the same. I do not see that it varies in any essential particular the case as it was then presented to the court and to the jury. Therefore, in obedience to the instructions of the court of appeals, I direct you to render a verdict in favor of the plaintiff, for the full amount of its claim. And, in so doing, I refuse the last two points that have been presented to me by the defendant, to wit:

193 III. The ordinances of the city of Philadelphia, approved January 6 1881 and March 30 1883, respectively, upon which this suit is brought, are regulations of commerce between the States so far as they are sought to be applied to the defendant, The Atlantic and Pacific Telegraph Company, and they are therefore void.

I decline to charge as above requested.

IV. So far as the defendant, The Atlantic and Pacific Telegraph Company, is concerned, the city of Philadelphia has no power to enact the ordinances of January 6, 1881 and March 30 1883, and your verdict should therefore be for the defendant.

I decline to charge as above requested.

Counsel agree that the amount for which you will render your verdict is subject to correction in case any error in the calculation of interest shall hereafter be found. They also agree that the court may diminish the amount of the verdict by the charge for the year 1885 and interest thereon if the court shall be of opinion that the defense set up by the defendant, of the statute of limitations, to that item of the claim, is well founded.

To this instruction to find for the plaintiff and also to the refusal of the defendant's two points, the defendant excepts.

194 And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court; and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record,

The said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And

thereupon the aforesaid judge, at the request of the said counsel for the defendant did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 10 day of May A. D. 1901.

JOHN B. McPHERSON.

The above bill of exceptions is correct.

E. SPENCER MILLER,
Per BELKNAP, *Att'y pro Pl'f.*

(Endorsed:) Cir. ct. U. S. E. dist. Pa. Oct. sess. 1891 No. 340 Bill of exceptions City of Philadelphia *vs.* Atlantic & Pacific Telegraph Co. Ap'l 27 '01 Presented J. B. McP. J. Read and Pettit Filed Aug. 2, 1901 Samuel Bell, clerk.

195 United States Circuit Court, October Sessions, 1891.

CITY OF PHILADELPHIA
vs.
THE ATLANTIC & PACIFIC TELEGRAPH COMPANY. } No. 93.

And now, to wit, this 17th day of May, A. D. 1901, the defendant moves that the amount of the verdict in the above cause be reduced by the sum of twelve hundred and seventy-nine and forty-four hundredths dollars, to wit, the amount of the license charges upon poles and wires for the year 1885, together with interest thereon, because the right to recover therefor is barred by the statute of limitations.

READ & PETTIT,
Att'ys for Defendant.

(Endorsed:) Octo. sess. 1891 C. C. U. S. 340. City of Phila. *vs.* Atl. & Pac. Tel. Co. Motion for reduction of verdict by $1279.44 Read & Pettit. Filed May 17, 1901 Samuel Bell, clerk, H. R.

196 U. S. Circuit Court, E. D. of Pa., October Sessions, 1891.

CITY OF PHILADELPHIA
vs.
ATLANTIC & PACIFIC TELEGRAPH CO. } No. 340.

Motion by Defendant to Enter Judgment with the Reduction Specified in the Reserved Point.

McPHERSON, *J.:*

This is an action brought by the City of Philadelphia to recover license fees charged against the defendant in respect of its poles and wires by virtue of certain ordinances. When the suit was brought, the fees for the year 1885 were more than six years overdue, and the question for consideration under the reserved point is, whether recovery of fees for that year is barred by the Pennsylvania statute of limitations.

The suit is in assumpsit, but as the practice act of 1887 has ap-

plied this name indifferently to the three forms of action that were known as covenant, debt and assumpsit, the name does little more than advise us that the action is *ex contractu*. The court is still required to scrutinize the cause of action, in order to determine to which of the three classes of contractual suits the present action belongs. Thus examined, it becomes clear that, before the act of 1887 was passed, the action of debt would have been the appropriate remedy to recover these fees, the ordinances providing no method of
197 collection. I had occasion to consider this question in Taylor Borough *v.* Central Pennsylvania Telephone Co., 8 Dist. Rep. 92, and as my views have not changed since that decision was made, I may be permitted to repeat a part of what was then said:

"It is true that the method of collecting the fee from the delinquent's property is not specified, but we see no difficulty in this silence. If the borough had lawful authority to impose such a fee, the defendant's duty to pay would at once arise; and as this duty would have been enforceable before the procedure act of 1887 by an action of debt (5 Am. & Eng. Ency., 167; 2 Shars. Bl. 159–160), it is now enforceable by an action of assumpsit. It seems to us a contradiction in terms to hold that the defendant is not obliged to pay unless the ordinance specifically declares by what method payment may be enforced. Save perhaps in exceptional cases, to say that a borough has authority to impose a fee, means that the citizen must pay or be subject to the compulsion of a suit. No doubt, in the interest of personal liberty, fines and penalties cannot be exacted without express provision in the ordinance; but the right to bring a civil suit, directed against the delinquent's property, seems to spring of necessity out of the right to levy the fee. Under the ordinance now being considered, the borough had no other remedy than the action of assumpsit."

The action now before the court is, therefore, the well-known action of debt, although it is labeled assumpsit; and the next step is to inquire whether an action of debt for license fees that are imposed by virtue of the police power of the State is within the Pennsylvania statute of limitations; for it is to be observed, that this statute does not bar all actions of debt, but merely "all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, except the proprietaries' quit rents." It does not seem necessary to refute at length the proposition, that such an action of debt as is now under consideration
198 is grounded upon "any lending or contract without specialty." It is an action upon an obligation imposed by law, and not upon an agreement voluntarily entered into by the defendant. It is contracts in fact, and not quasi contracts, that are included in the phrase just quoted, as the Pennsylvania courts have several times decided. The statute does not limit actions of debt that are not founded upon a lending or a contract in fact: Richards *v.* Bickley, 13 S. & R. 396; Roller *v.* Meredith, 4 Superior, 461.

The reserved point must be decided in favor of the plaintiff, and judgment will accordingly be entered upon the verdict without diminution.

(Exception to the defendant.)

(Endorsed:) 340 Oct. 1891 U. S. C. C. City of Phila. *vs.* Atlantic & Pacific Telegraph Co. Opinion, McPherson, J. ordering judgment to be entered on the verdict. Filed May 29, 1901 Samuel Bell, clerk H. R.

199 CITY OF PHILADELPHIA *vs.* ATLANTIC & PACIFIC TELEGRAPH Company. } U. S. C. C., Oct. Sess., 1891, No. 340.

Stipulation.

The parties hereto have revised the calculation of interest upon which the verdict is in part based and as a result correct the amount of the assessment of damages by substituting the sum of $7267.48 for the sum in which the jury rendered their verdict. They agree further that of this sum a portion equal to $1279.44 consists of the charges for poles and wires maintained by defendant company in 1885 and interest to the date of the verdict.

This agreement is without prejudice in any way whatsoever to the right of either party to writ of error or appeal in this cause.

Witness the hands of the parties by their attorneys, June 11th, 1901.

E. SPENCER MILLER,
Ass't City Solicitor for City of Philadelphia.
READ & PETTIT,
Att'ys for Atl. & Pac. Tel. Co.

200 (Endorsed:) Oct. sess. 1891 No. 340 City of Philadelphia *vs.* The Atlantic & Pacific Telegraph Co. Stipulation Filed June 11, 1901 Samuel Bell, clerk.

201 Supreme Court of United States, October Term, 1901.

ATLANTIC AND PACIFIC TELEGRAPH COMPANY, Plaintiff in Error, *vs.* CITY OF PHILADELPHIA, Defendant in Error. } No. —.

And now, to wit, this second day of August A. D. 1901, the plaintiff in error files its assignments of error in the above cause and assigns for error as follows:—

I. The court erred in overruling the objection made by the defendant to the following question asked by the plaintiff's counsel of the witness, Hon. A. M. Beitler, to wit:—

"Are you able to state whether the presence of wires overhead on telegraph poles a little distance inside the curb line is any substantial interference with the work of the fire service?"

II. The learned judge who tried the cause erred in not reducing

the amount of the verdict by the charge for the year 1885 and interest thereon.

III. The learned court erred in entering judgment against the defendant for the amount of the charge for the year 1885.

IV. The learned court erred in including in the amount of the judgment the license charges for the year 1885.

V. The learned judge who tried the cause erred in charging the jury as follows:—

"We instruct you to render a verdict in favor of the plaintiff, The City, for the full amount of its claim."

202 VI. The learned judge who tried the cause erred in refusing the third point submitted by the defendant, which third point was as follows:—

"The ordinances of the city of Philadelphia, approved January 6 1881 and March 30 1883, respectively, upon which this suit is brought, are regulations of commerce between the States so far as they are sought to be applied to the defendant, The Atlantic and Pacific Telegraph Company, and they are therefore void."

The answer of the learned judge thereto being as follows: "I decline to charge as above requested."

VII. The learned judge who tried the cause erred in refusing the fourth point submitted by the said defendant, which fourth point was as follows:—

"So far as the defendant, The Atlantic and Pacific Telegraph Company, is concerned, the city of Philadelphia has no power to enact the ordinances of January 6 1881 and March 30 1883, and your verdict should therefore be for the defendant."

The answer of the learned judge thereto being as follows: "I decline to charge as above requested."

VIII. The learned court erred in entering judgment in favor of the plaintiff for seven thousand two hundred and sixty-seven 48/100 ($7,267.48) dollars.

READ & PETTIT,
Attorneys for The Atlantic & Pacific Telegraph Co., Plaintiff in Error.

(Endorsed:) Supreme Court of the United States October T. 1901 No. —. Atlantic and Pacific Telegraph Company plaintiff in error *vs.* City of Philadelphia defendant in error Assignment of errors Read & Pettit Filed Aug. 2, 1901 Samuel Bell, clerk

203 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

CITY OF PHILADELPHIA
vs.
THE ATLANTIC & PACIFIC TELEGRAPH CO. } October Sessions, 1901, No. 340.

The petition of the Atlantic & Pacific Telegraph Company respectfully shows:

That on the 29th day of May 1901 a judgment was entered in the

circuit court of the United States for the eastern district of Pennsylvania in the above case, whereby your petitioner was aggrieved, and your petitioner herewith files its assignments of error, setting out separately and particularly each error which your petitioner assigns in said judgment and in the record of the proceedings prior thereto.

That said case involves the construction or application of the Constitution of the United States.

That said suit is brought to recover from the defendant certain license charges sought to be imposed by the City of Philadelphia on the said defendant, which the said defendant claims the said City of Philadelphia has no right or power to impose, for the reason that the same are a regulation of commerce between the States.

Wherefore, in accordance with the statute in such case
204 made and provided, your petitioner prays that a writ of error may be granted from said judgment to the Supreme Court of the United States.

And your petitioner will ever pray, etc.

THE ATLANTIC & PACIFIC TELEGRAPH COMPANY,
[SEAL.] By THOS. F. CLARK,
Vice-President.

205 STATE OF NEW YORK, }
County of New York, } ss:

Thomas F. Clark being duly sworn according to law, deposes and says that he is the vice-president of The Atlantic & Pacific Telegraph Company, the above-named petitioner, and on behalf of the said company says that the facts set forth in the foregoing petition are true, to the best of his knowledge, information and belief.

THOS. F. CLARK.

Sworn to and subscribed before me this 16th day of June, A. D 1901.

E. A. MACCLEAN,
[SEAL.] *Notary Public, N. Y. Co., No.* 1.

Allowed by the court.

(Endorsed:) C. C. U. S. for the eastern district of Pennsylvania October sess. 1891. No. 340. City of Philadelphia *vs.* Atlantic and Pacific Telegraph Co. Petition for a writ of error Read & Pettit Filed Aug. 2, 1901 Samuel Bell clerk.

206 Supreme Court of United States, October Term, 1901.

THE ATLANTIC & PACIFIC TELEGRAPH CO., Plaintiff in Error,
vs.
CITY OF PHILADELPHIA, Defendant in Error.
} No. —.

Know all men by these presents, that The Atlantic & Pacific Telegraph Company, as principal, and American Surety Company of New York as surety, are held and firmly bound unto the City of Philadelphia in the full and just sum of fourteen thousand five hundred and thirty-four dollars and ninety-six cents ($14,534.96), to be paid to the said City of Philadelphia, its certain attorney, successors or assigns, to which payment well and truly to be made we do bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this first day of August anno Domini one thousand nine hundred and one.

Whereas, lately, in the circuit court of the United States for the eastern district of Pennsylvania, judgment was entered against the Atlantic & Pacific Telegraph Company at the suit of the City of Philadelphia, October sessions, 1891, No. 340, and the said Atlantic & Pacific Telegraph Company having obtained a writ of error to the Supreme Court of the United States to reverse the said judgment rendered in the last above-entitled action, having filed a copy
207 thereof in the office of the clerk of said court and a citation directed to the said City of Philadelphia citing and admonishing it to be and appear in the Supreme Court of the United States, to be holden at Washington the second Monday of October next.

Now the condition of the above obligation is such: that of the said Atlantic & Pacific Telegraph Company shall prosecute their said writ of error to effect and answer all damages and costs, and if they shall fail to make their plea good, then the above obligation to be void, or else to remain in full force and virtue.

THE ATLANTIC & PACIFIC TELEGRAPH COMPANY,
By THOS. F. CLARK, *Vice-President.*
[SEAL.] AMERICAN SURETY CO. OF NEW YORK,
By R. R. BENEDICT, *Resident Vice-President.*

Attest: EDW. P. BAILEY,
Resident Ass't Secretary. [SEAL.]

Sealed and delivered in the presence of—
E. A. MACCLEAN.

Approved by the court.

(Endorsed:) Supreme Court of United States October T. 1901. No. — Atlantic and Pacific Telegraph Company plaintiff in error *vs.* City of Philadelphia defendant in error Bond Read & Pettit Filed Aug. 2, 1901 Samuel Bell, clerk.

208 CITY OF PHILADELPHIA
vs.
ATLANTIC AND PACIFIC TELEGRAPH Company.
U. S. C. C., October Sessions, 1891, No. 340.

We, the undersigned, do hereby stipulate and agree that the following papers shall constitute the record in the appeal to the Supreme Court of the United States in the case of The City of Philadelphia *vs.* The Atlantic and Pacific Telegraph Company.

Exemplification of record.
Affidavit of defense.
Præcipe for appearance.
Pleas.
Amended statement.
Additional plea filed at trial.
Motion for reduction of verdict.
Opinion ordering judgment to be entered on verdict.
Stipulation as to assessment of damages.
Bill of exceptions with exhibits.
Petition for writ of error and order thereon.
Assignments of error.
Citation.
Writ of error.
Bonds surwrit of error.

And we direct the clerk of the circuit court to certify to
209 the above papers only.

E. SPENCER MILLER,
Ass't City Sol'r.
READ & PETTIT,
Att'ys for the Atlantic & Pacific Telegraph Company.

(Endorsed:) C. C. U. S. October sess. 1891 No. 340 City of Philadelphia *vs.* Atlantic and Pacific Telegraph Co. Agreement as to what papers shall constitute the record Read & Pettit Filed Aug. 2, 1901 Samuel Bell, clerk.

210 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *sct:*

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of City of Philadelphia *vs.* Atlantic & Pacific Telegraph Company No. 340 Oct. sess. 1891 as per stipulation of counsel filed, a copy of which is hereto attached, on file and now remaining among the records of the said court in my office.

Seal U. S. Circuit Court, E. D. Pennsylvania.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this eighth day of August in the year of our Lord one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-sixth.

SAMUEL BELL,
Clerk of C. C.

[Endorsed:] No. 340 Oct sessions 1891 Circuit court United States, eastern district of Pennsylvania. City of Philadelphia *vs.* Atlantic & Pacific Telegraph Co. Certified copy of record.

Endorsed on cover: File No. 18,264. E. Pennsylvania C. C. U.S. Term No. 163 Atlantic and Pacific Telegraph Company, plaintiff in error, *vs.* City of Philadelphia. Filed September 12", 1901.

FILE COPY.

1929

No. 193. October Term, 1902.

Office Supreme Court U.
FILED
FEB 20 1903
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

The Atlantic and Pacific Telegraph Company,
Plaintiff in Error,

against

The City of Philadelphia, Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

H. B. GILL,
SILAS W. PETTIT,
For Plaintiff in Error.

GEORGE H. FEARONS,
BROWN & WELLS,
RUSH TAGGART,
HENRY D. ESTABROOK,
JOHN F. DILLON,
Of Counsel.

Press, Franklin Printing House, Philada.

19298

IN THE SUPREME COURT OF THE UNITED STATES.

The Atlantic and Pacific Telegraph Company, Plaintiff in Error,

against

The City of Philadelphia, Defendant in Error.

October Term, 1902.

No. 163.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania. The question is, whether the city of Philadelphia can collect of the telegraph company the sums of one dollar per telegraph pole per annum, and of two dollars and fifty cents per mile of telegraph wire per annum, imposed by it as a license tax in the alleged exercise of its police power.

The defense was that the company is engaged in the business of interstate commerce; that its poles and wires are the necessary instrumentalities of that business; and that the said tax is illegal because a burden upon and regulation of interstate commerce and as such prohibited by the commerce clause of the Constitution of the United States.

The further defense of the defendant was that it had paid its taxes in full; had accepted the Act of Congress of July 24th, 1866, and that the ordinances imposing a tax on poles and on wires were revenue ordinances; that fees

and charges were unreasonable, and more than ten times the cost of regulating and supervising, and that the said ordinances were void and have no effect, because the city had no authority to pass the same, and also because the same were in conflict with the commerce clause of the Constitution. (Record, pages 15, 16.)

Upon the trial of the case the jury was instructed to find a verdict for the plaintiff for the full amount of its claim (Record, page 82) upon evidence substantially as follows:—

The city, as plaintiff, gave in evidence an ordinance of January 6th, 1881 (Record, page 26), entitled "An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the city of Philadelphia," as follows:—

> "WHEREAS, Great inconvenience and annoyance have been occasioned to property owners by the placing of telegraph poles in front of their premises;
>
> "AND WHEREAS, The lives and property of citizens traveling upon the public streets and highways have been imperiled by the erection and maintenance of inadequate or unsound telegraph poles thereon, so that it has become necessary to establish a system for the proper inspection of such poles, and for the regulation of the erection and maintenance thereof."

Therefore it was provided that whenever Councils should grant permission to any company to erect poles in the street, such company should apply to the Superintendent of Police and Fire Alarm Telegraph for a license to erect the same, and for which it should pay five dollars a pole; that it should be the duty of the Superintendent to "*cause a thorough and careful inspection to be made at least once in each year of all telegraph or telephone poles erected within the corporate limits of the city of Philadelphia,*" and notify the owners of any of those found dangerous; that such poles should be marked and numbered, and it should be the duty of the owner to take out a yearly

license for their maintenance, for which they should pay one dollar a pole.

The city offered in evidence another ordinance of March 30th, 1883 (Record, page 28), which is entitled, "An ordinance to regulate the introduction and use of underground conduits, wires, and cables for electrical conductors, *and to provide for charges for* underground, overground, or overhead wires, and to repeal an ordinance entitled," &c.

By this ordinance it was provided that all companies which theretofore had, or thereafter might have, permission to lay underground conduits for electrical conductors, and all companies to whom permission had been, or might be, given for the erection of poles, wires, &c., upon the streets, should conform to said ordinance. Sections 2, 3, 4, 5, 8, 10, and 11 apply solely to the regulation of underground conduits; section 6 provides that the owners of wires and electrical conductors, underground or upon poles, should make an annual return to the Superintendent of Police and Fire Alarm Telegraph of the number, location, and miles of such wire; and section 7 requires an annual payment of five dollars per mile per wire for electric lighting, and two dollars and fifty cents per mile per wire for telegraphic purposes, where such wires are suspended above ground; and two dollars and fifty cents per mile per wire for electric lighting, and one dollar per mile per wire for telegraphic purposes, where they are placed underground; section 12 is the usual repealing clause.

The city also offered in evidence an ordinance of August 5th, 1886 (Record, page 32), which is in effect a reenactment, with some alterations, of the regulations of the ordinance of March, 1883, in respect to laying, maintaining, and operating underground conduits for electrical conductors, except that the charges imposed upon electrical conductors placed under ground were thereby repealed. That is to say, that since August 5th, 1886, no annual charge is imposed on electrical conductors placed underground.

Having proved these ordinances and offered in evidence the defendant's return of the poles and wires maintained by it, the city rested its case.

The defendant proved that it had accepted the Act of Congress of July 24th, 1866, and called Mr. William B. Gill, its superintendent at Philadelphia, who testified to his knowledge of the poles and wires in question and described their location, and that—

> "They were used for the general business of the entire country, messages from all parts of the South, the North, the East, and West, all going to Washington or New York and New Orleans, or cablegrams or Government messages.
>
> "Q. During that time what regulation or supervision did the city of Philadelphia exercise over these poles and wires?
>
> "A. None. The supervision and regulation is looked after by the telegraph company itself. When we desire to take down a line of poles with wires on we get a permit from the Electrical Department; if we desire to renew a line of poles we get a permit from the Electrical Department, and then we get a permit for our line, which is given once a year." (Record, page 36.)

Upon cross examination the witness testified that the company had fourteen linemen constantly employed looking after and keeping in repair the poles and wires of the company.

> "Q. Do I understand you to say that the Electrical Bureau performs no supervision?
>
> "A. Except that that I have named in issuing the permit." (Record, page 46.)

Mr. Gill also testified that there were thirty-seven poles to the mile, and about twenty to twenty-five wires on the poles of the defendant company; thus showing that the license charge amounted to about three dollars and ninety-eight- cents ($3.98) per mile of wire; and that

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the average rate of actual cost for maintenance and keeping in repair (including therein of necessity the inspection, as well as the new poles, wires, cross arms, insulators, and other material used in and the labor of doing the work) of the poles and wires of the Western Union Telegraph Company for the seven years included in the suit was one dollar and sixty and three-sevenths cents ($1.60 3/7 per mile of wire, that is to say, the cost of maintenance, including inspection, repair and renewal, labor and materials, was less than one-half as much as the city's tax for its alleged regulation and inspection of said poles and wires. (Exhibit No. 1, Record, page 59.)

Defendant also showed that the amount of the license charges imposed by the city under the ordinances sued on for the years in question was from $16,281.27 to $18,349 per annum (Exhibit No. 2, Record, page 59), and that the total salaries and incidental expenses of the Electrical Bureau was from $8100 in 1885, to $24,630 in 1891, and it was also shown that the reason of this large increase in the expenses of the Bureau was because the lines of the city itself had increased from thirty-six hundred and eighty-six poles in 1885 to fifty-five hundred and thirty poles in 1891, and from five hundred and thirty-eight miles of wire in 1885 to eight hundred and thirty-seven miles of wire in 1891, and because of the construction and operation by the city of some two million feet (three hundred and seventy-eight miles) of underground conduits, part of which it rents to the companies.

For the seven years for which suit was brought the evidence showed that the whole expense of the Electrical Department was $111,910, including therein the salaries of the chief, his clerks, foreman, linemen, horse and wagons, &c., while the total of the license charges for the same years amounted to $118,864.77.

The reports of the Electrical Bureau were put in evidence to show that the Bureau had issued the following number of permits for poles and wires in the years men-

tioned, to wit: 1886, 250; 1887, 146; 1888, 161; 1889, 289; 1890, 336; 1891, 534. (Record, pages 49, 50, 79, 59, 60, 61.)

In rebuttal the city called Mr. Walker, its Chief of the Electrical Bureau (formerly called the Superintendent of Police and Fire-Alarm Telegraph), who testified, among other things, as follows:—

> "Q. Please mention just what the employees of the Electrical Bureau do with regard to wires belonging to other parties than the city of Philadelphia. I am now speaking of overhead wires.
>
> "A. We have a chief line inspector, who is constantly upon the street all over the city, looking after lines, to see that they are in order, and that everybody uses proper care so far as safety is concerned—poles and wires—and where he comes across any poles that have decayed or any that is liable to be pulled down, or in a dangerous condition in any way, he reports to me—to the head of the office—and from me it is communicated to the parties interested, telephone, telegraph, and electric light companies, to give the matter attention. When it is urgent, we give it immediate attention, or as soon as possible, to avoid accidents. Our other men do the same way, and they report—our linemen, what we call pole climbers. We have a great many complaints from citizens, of these housetop wires that have been placed upon their buildings without authority, some places, to go and cut them off. Others where they are cut and dangling over the fronts of buildings. We send out our linemen to remove those ends, or whatever may be hanging over the buildings, or dangerous, in the street. In other words, to keep the street clear of all dangerous wires." (Record, page 58.)

And on being recalled after adjournment, he continued:—

"The Bureau supervises the erection, construction, and maintenance of all poles and wires, of any kind of electrical work upon the highways; supervises the construction and maintenance and see that they are kept in proper position, and see that they are placed in the proper position, that is to say, with telegraph wires the rule of the Department is that telegraph wires shall be above the electric light wires where it is possible to have it so. The electric light wires are not permitted over the top of other wires if it can be avoided.

"Q. The object of that is what?

"A. Safety. To prevent accidents." (Record, page 62.)

Mr. Walker also testified in respect to the ordinances given in evidence:—

"By Counsel for the City:—

"Q. *What was the object of these changes*, imposing a charge on overhead wires, and the removal of charges from underground wires?

"A. *As an inducement for them to place their wires underground.* To remove them from this danger of overhead construction and the accumulation of dangerous wires." (Record, page 65.)

On cross examination he testified:—

"Q. In respect to the granting of permits to these telegraph companies, is there any man or boy about your place that you can dispense with if you do not have those permits to grant?

"A. No, sir; we are very much crippled for help as it is; our force is too small." (Record, page 68.)

The city also called Hon. A. M. Beitler, Judge of the Court of Common Pleas, who formerly was in the Law Department of the city, and also was Director of Public Safety for several years, and as such acquainted with the city's business, who testified as follows:—

"Q. Will you state to the court and jury what branch of the city government has the most intimate relations with the matter of poles and wires in the streets of the city?

"A. The department, of course, is the Department of Public Safety; but the bureau in that department that has the most to do with the subject is the Electrical Bureau; incidentally, and to an extent considerable, but not as great as the Electrical Bureau, the Police Bureau has to do with it, and from the standpoint of inconvenience, the Fire Bureau has to do with the subject. * * * The Electrical Bureau of the city of Philadelphia is unlike, I think, the Electrical Bureau of any other city. It comprises all the branches of electrical service, has charge of the telephone service of the city of Philadelphia, including the patrol-box system, and also of the fire-alarm system. It has, in addition to that, the entire charge of the erection, the renewal and the supervision of all the electrical construction, whether the city's or a company's, in locating wires, either underground or overhead." (Record, pages 51, 52.)

He further testified that the police were instructed to see that the electric lights (about nine thousand lamps at the time of trial) were kept burning regularly, and to report upon any structures on the highway that could result in harm, not only poles and wires, but trees, sign posts, &c., and produced a blank form of report which the patrolmen were required to fill up (Exhibit B, Record, page 80) in respect to pavements, curbs, gutters, roadways, posts, trees, and other structures on the highways out of repair or dangerous.

In respect to the Fire Department, he testified that the firemen were equipped with an apparatus to cut the wires if they obstructed them in dealing with a fire. (Record, pages 51-53.)

There was considerable testimony introduced to show

that accidents happen from contact with wires charged with electricity, and that persons have been injured and fires occasioned thereby, and was, in substance, to the effect that while the electricity with which a telegraph wire is charged is entirely harmless, yet that electric-light wires and trolley wires are so charged with electricity that the current is dangerous to persons coming into contact therewith, and is sometimes the occasion of fire, and that where electric-light or trolley wires come in contact with telegraph, or even telephone wires, they sometimes so charge the latter wires as to render them also dangerous, and that the liability to such accident was greatly reduced by placing the electrical conductors under ground. It clearly appeared that telegraph wires had not been dangerous prior to the introduction of wires for electric lighting and street car—purely urban—purposes, and even now were only dangerous when brought into accidental contact with such wires.

There was absolutely no evidence on the part of the city that the yearly inspection provided for by the ordinance of 1881 was ever made, nor of any definite expenditure by it in the supervision or regulation of telegraph wires, nor that any part of the time or services of policemen or firemen, or any other employee of the city, was given to the regulation or supervision of telegraph poles and wires: while in respect to the services of the employees of the Electrical Bureau, which alone had any particular concern with telegraph poles and wires, it was shown that what they had to do, or did, in respect thereto was incidental merely to their services in attending to the City's own telegraph and telephone poles and wires, and there was no allegation even that said employees were directly employed at any time in inspecting or regulating the wires of telegraph companies. It was shown by the defendant that the total of the license charges was about equal to the total salaries and office expenses of the department which had the construction, repair, and management of the city's lines of police and fire alarm, telegraph and telephone; and it was also shown that while

the average cost for the nine years in question of maintaining and keeping in repair the poles and wires of the company was only one dollar and sixty and three-seventh cents ($1.60 3/7) per mile of wire per annum, which charge necessarily included the inspection required to ascertain the need of repair or reconstruction, as well as the cost of the material used in and the doing the work, yet the license charge of the city for inspection and regulation merely, amounted to three dollars and ninety-eight cents ($3.98) per mile of wire per annum; or, in other words, more than twice as much.

The court instructed the jury to find a verdict in favor of the plaintiff for the full amount of its claim and from the judgment thereon this appeal has been taken to this court.

SPECIFICATIONS OF ERROR.

I. The court erred in overruling the objection made by the defendant to the following question asked by the plaintiff's counsel of the witness Hon. A. M. Beitler, to wit:—

> "Are you able to state whether the presence of wires overhead on telegraph poles a little distance inside the curb line is any substantial interference with the work of the fire service?"

II. The learned judge who tried the cause erred in not reducing the amount of the verdict by the charge for the year 1885 and interest thereon.

III. The learned court erred in entering judgment against the defendant for the amount of the charge for the year 1885.

IV. The learned court erred in including in the amount of the judgment the license charges for the year 1885.

V. The learned judge who tried the cause erred in charging the jury as follows:—

"We instruct you to render a verdict in favor of the plaintiff, the City, for the full amount of its claim."

VI. The learned judge who tried the cause erred in refusing the third point submitted by the defendant which third point was as follows:—

"The ordinances of the city of Philadelphia, approved January 6th, 1881, and March 30th, 1883, respectively, upon which this suit is brought, are regulations of commerce between the States so far as they are sought to be applied to the defendant, the Atlantic and Pacific Telegraph Company, and they are therefore void."

The answer of the learned judge thereto being as follows:—

"I decline to charge as above requested."

VII. The learned judge who tried the cause erred in refusing the fourth point submitted by the said defendant, which fourth point was as follows:—

"So far as the defendant, the Atlantic and Pacific Telegraph Company, is concerned, the city of Philadelphia has no power to enact the ordinances of January 6th, 1881, and March 30th, 1883, and your verdict should therefore be for the defendant."

The answer of the learned judge thereto being as follows:—

"I decline to charge as above requested."

VIII. The learned court erred in entering judgment in favor of the plaintiff for $7267.48.

(N. B.—It is not intended to argue the four assignments first stated.)

ARGUMENT.

I.

It is to be noted that this case differs from that of the Western Union Telegraph Company, plaintiff in error, against the Borough of New Hope (October Term, 1902, No. 101) argued before this court in December last and recently decided in this, that in that case the court left it to the jury to find whether the license fee exceeded what was reasonable under the circumstances, while in this case the court itself passed upon the question and gave a binding instruction to the jury to find for the plaintiff for the whole amount of both taxes—*i. e.*, the pole tax imposed by ordinance of 1881 and the wire tax imposed by ordinance of 1883.

The contention in this case is that the City of Philadelphia had no power to pass either of the ordinances or to impose either of the taxes in question, and that even if the City has the power to impose any charge as incident to a police regulation, the tax on the wires imposed by ordinance of 1883 was not imposed as part of such police regulation and is not justified under the police power; and that in respect to both ordinances, the evidence showed that the amount thereof was excessive, and therefore that the court below erred in instructing the jury to find for the plaintiff for the full amount sued for.

It is also to be noted that the case now under argument before this court differs from that of the City of Philadelphia against Western Union Telegraph Company in the Circuit Court of Appeals for the Third Circuit (reported 89 Fed. Rep., 454), in this, that the evidence in that cause differs materially from the evidence in the cause now before the court, as will be readily seen by comparison of the evidence as reported in 89 Fed. Rep., pages 454-460, with the evidence presented in this cause as shown by the record thereof.

In that case the Circuit Court of Appeals, per Mr. Jus-

tice Shiras, states the law to be that the charges in question were imposed under the police power and were valid, if reasonable in their amount and mode of collection, notwithstanding they were imposed upon a corporation engaged in interstate commerce, that the exaction of a license tax is a valid exercise of power by municipal corporations in order to cover expenses to which they may be put in the enforcement of their police rules and regulations, but that the legislative power to impose such taxes is not absolute, and the reasonableness of the exercise thereof can be judicially inquired into, and said that:—

> "The rule laid down in Cooley Const. Lim. (ed. 1886), page 242, may be safely adopted; 'a municipal corporation may impose under the police power such a charge for the license as will cover the necessary expenses of issuing it and the additional labor of officers and other expenses thereby incurred.' " (Page 461.)

We deny where (as in the case of telegraph companies which have accepted the Act of Congress of July 24th, 1866), Congress has regulated a subject of interstate commerce, that the States can further regulate the same subject and make a charge by way of a license fee or otherwise as a condition of the exercise of the right, or to reimburse the State the cost of such regulation; and if any charge is admissible, it is at most the absolutely necessary cost of executing inspection ordinances and regulations to see that they are kept in safe and proper condition.

In that case (89 Fed. Rep., *supra*) both sides conceded that under the evidence the reasonableness of the license fee was a question for the court to decide, and each requested a binding instruction in its favor, whereupon the court directed the jury to find for the defendant, and this judgment was reversed with direction to award a new trial upon the ground that certain evidence offered by the plaintiff had been excluded by the court, to wit,

"Evidence going to show that considerable additional expense in providing a greater number of fire companies and apparatus is rendered necessary by the electric wires extended in the street"; and also in "excluding the evidence offered of the expenses to which the City is, from time to time, put in connection with meeting of its councils for the purpose of regulating its wires and poles." (Page 462.) The Court also held that the case was one which should properly be decided by a jury.

Upon the trial of the case now under consideration no such evidence was offered—nor in fact could be.

And so also the evidence offered upon the last trial of this case, shown upon the record now before the Court, differs materially from the evidence offered upon the previous trial of this case, as can be readily inferred from the statement thereof, because upon that trial the jury having found in favor of the City for only about one-half of the claim, the judgment was reversed because of the refusal of the Court to affirm certain points appearing in the statement of the case as reported, which points could not be predicated upon the evidence produced at the last trial and printed in the record in this case.

Philadelphia *vs.* Atl. & Pac. Tel. Co., 102 Fed. Rep., 254.

In the present case the utmost that can be said of the evidence offered by the city is that it afforded ground for an inference that some part of the time of the employees of the Electrical Bureau was given to the issuing of the permits for and the inspection and regulation of the poles and wires of the telegraph companies, but it cannot be pretended that it in any way defined what part of the time of said employees was so occupied, or even tended to show what was the actual cost to the city for the service rendered; had the action been on a *quantum meruit* the plaintiff must certainly have been nonsuited. On the other hand, the defendant's evidence, besides being contradictory and explanatory of the city's statement of services rendered, showed that the charge made could

not be "reasonable," because it was twice as much as the cost of the maintenance and repair of the lines involved, that is to say, that the city charged twice as much for inspection and regulation as it cost the company to inspect, regulate, repair, and renew the said poles and wires, including therein the cost of the new material used, as well as the labor of placing it, and because the total of the charges made by the city to the telegraph companies was equal to the whole cost of the maintenance of the office of the Electrical Bureau, charged as it was with many other and important duties in respect to the city's own and much more extensive lines of telegraph poles and wires, its underground wires and its many thousand of electric lights—a Bureau of which one of the city's witnesses testified:—

> "The Electrical Bureau of the city of Philadelphia is unlike, I think, the electrical bureau of any other city. It comprises all the branches of electric serice, has charge of the telephone service of the city of Philadelphia, of the police system of the city of Philadelphia, including the patrol-box system and also of the fire-alarm system. It has, in addition to that, the entire charge of the erection, the renewal, and the supervision of all the electrical construction, whether the city's or a company's, in locating either underground or overhead." (Record, page 52.)

Of these duties the supervision and regulation of the poles and wires of telegraph companies appears from the evidence to have been a mere incident discharged by the City's employees by reporting any injury to or defect in these lines observed by them while attending to the City's property.

Upon the evidence the license tax of five dollars per pole for the permit to erect the same would have been ample to refund to the city all expenses which the evidence in this case showed, or tended to show, that it had incurred in this behalf.

The court therefore erred in holding that the ordinances were valid, and that the license fees or charges thereby imposed were valid, and in giving a peremptory instruction to the jury to find for the City the full amount of its claim, thereby depriving the defendant of the right to have the reasonableness of the license fee or charge or tax passed on by the jury.

II.

The only authority claimed by the city to impose the license tax in question is under and in aid of its police power.

The City of Philadelphia as laid out by Penn consisted of a strip of land about one mile in width, extending from the Delaware to the Schuylkill River, a distance of about two miles. At a very early date a number of the townships were incorporated as districts, having distinct municipal governments, until finally, by Act of February 2d, 1854 (P. L., 21), entitled "An Act to incorporate the City of Philadelphia," said City proper, together with all the outlying districts and townships within the County, were consolidated into one municipal corporation, called the City of Philadelphia, and coterminus with the limits of the County of Philadelphia. The powers of the City, as of the various districts, were conferred by many Acts of Assembly, and are too numerous to detail, but it is enough to say that no express power was given by any of such Acts to tax, regulate, or license telegraph poles and wires, and no implied power, except in so far as the Act of incorporation, by section 4, enacted:—

> "The legislative powers of the said City shall be vested in two bodies, to be called the Select and Common Councils, &c."

And by section 6 enacted:—

> "Upon the first organization of the Councils provided in the preceding section, the City of Phila-

delphia as established by this Act shall be vested with all the powers, rights, privileges, and immunities incident to a municipal corporation and necessary for the proper government of the same, and those of the present corporation of the Mayor, aldermen, and citizens of Philadelphia * * * and all the powers, rights, privileges, and immunities possessed and enjoyed by the following corporations, respectively, and all officers under them, to wit:"

Then follows the enumeration of the twenty-eight districts, boroughs, and townships theretofore included within the County of Philadelphia.

It will thus be seen, therefore, that the pretended power of the City of Philadelphia to impose the tax in question is derived solely from its possession of the "powers, rights, privileges, and immunities incident to a municipal corporation and necessary for the proper government of the same," and from no other source whatsoever. But this does not confer power to enact the ordinances in question.

Cooley on Taxation, page 597.

Numerous municipalities in the State of Pennsylvania have imposed these license charges upon telegraph poles and wires of the plaintiff in error and other telegraph companies, payment of which has always been resisted, and the validity of the same has therefore been frequently brought before the Supreme Court of that State; which court, however, has uniformly sustained said charges and enforced their collection.

If, therefore, the City has any power at all to impose a tax for the maintenance of telegraph poles and wires in its streets as part and in aid of a police regulation, which we deny, it is confidently asserted that in none of the cases cited has that court applied the rule, as defined by all the authorities, which limits the amount of police charges to the expenses of police regulation.

The City of Allentown imposed a license tax of one dol-

lar per annum per telegraph pole and brought suit against the Western Union Telegraph Company to recover same. The court charged, *inter alia*, that "*the expense of inspecting the poles during the years in question amounts to nothing, and at the furthest it involved only the attention of the police officers for one or two days, and that these officers served at the rate of forty dollars a month,*" but further added that the City had power to impose the tax and that if the jury found that the poles were maintained as alleged, then to find for the plaintiff.

Upon error the Supreme Court of Pennsylvania held that the only question was, Whether the license tax was reasonable; that the amount thereof rests with the Councils in the first instance, and that

> "We cannot say that this discretion has been abused in this instance or that the license fee is unreasonable."
>
> Allentown *vs.* West. Un. Tel. Co., 148 Pa., 117.

In a suit brought by the City of Chester to recover like charges the telegraph company filed an affidavit of defense, in which it averred that the sum claimed as a license tax was unjust and unreasonable in that the amount was at least five times "the usual, ordinary, or necessary expense" of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality of the City of Chester.

As to this the Court said:—

> "The difficulty is it does not go far enough. It refers only to the usual, ordinary, or necessary expenses of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe and properly maintained, and should a citizen be in-

jured in person or property by reason of the neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year to the particular purposes specified in the affidavit."

Chester City *vs.* Western Union Telegraph Co., 154 Pa., 464.

In a suit subsequently brought by the City of Philadelphia to recover pole and wire license taxes the telegraph company endeavored to meet this statement by the Supreme Court of the elements of justification for such charges by an affidavit of defense, wherein it averred that the charges imposed were more than ten times—

"not only the cost of regulating the poles and wires and isusing licenses therefor and of the ordinary and necessary expenses imposed upon the city of Philadelphia thereby, but also all extraordinary expenses of the said city of Philadelphia, or its municipal officers, or damages arising from liability imposed upon the city by the erection and maintenance of said poles and wires, and all other costs and damages, liability for damage, loss, injury, and expenses of every nature whatsoever."

The court below made absolute a rule for judgment for want of a sufficient affidavit of defense without opinion, and the opinion of the Supreme Court of Pennsylvania brushed aside the allegation of the affidavit in the following manner:—

"We find nothing in the record that would justify us in sustaining either of the assignments of error. There was no error in entering judgment against the

defendant company for want of a sufficient affidavit of defense."

Philadelphia *vs.* American Union Tel. Co., 167 Pa., 406.

Without going over the whole list of cases, of which the above are fair samples, it is enough to say that the remainder of them reach the same result in the same way as in those above cited, and that no real attempt has ever been made to affirmatively show that the so-called license fee in any of the cases was based upon, or could be supported by, evidence of the actual expense incurred by the municipality for the inspection or regulation of the poles and wires licensed, nor was there any evidence of any prospective expense or charge to the municipality by reason of the maintenance thereof.

It must be constantly borne in mind that the power to tax and the power to regulate are entirely distinct powers, and that, as will be hereinafter conclusively shown, the municipalities of Pennsylvania have no power to tax the poles and wires in question; whatever powers they may have over such poles and wires are powers of regulation only.

The authorities are numerous and uniform to the effect that any pecuniary charge levied under express power to license and regulate must be limited to the reimbursement of the expense incurred in the regulation; this is, indeed, iterated and reiterated in the Pennsylvania cases above cited or referred to.

When, therefore, examination of those cases shows that in no single instance has any attempt been in any way made to apply the rule so announced or to measure the charge in question in the particular case, by the expense incurred by the municipality in that instance, it is respectfully insisted that it devolves upon this Court to examine the case as though brought originally before it.

If it is said that in the cases cited and referred to the

Courts based their decisions not upon expenses incurred, but upon the possible liabilities of the future, it would seem that the answer is plain—that the expectation of the future must be ascertained from the experience of the past. It was competent for the Telegraph Company to call witnesses to prove what had been done in the past, and to show that no expense and liability had been incurred by the City, but it was quite impossible for it to call witnesses to prophesy what would happen in the future. This suit involved taxes for seven consecutive years, and if during all those years the City had in fact been put to no expense and had incurred no liability, as was testified to by the defendant's witness, the case should have been submitted to the jury with proper instructions, and the jury would have had the right to infer that there was no expense to be repaid and no liability to be guarded against.

In point of fact, upon the first trial of this case when it was submitted to the jury, the jury notwithstanding the well-known prejudice against corporations, found for the City, but for about one-half of its claim.

It is not intended to argue that the City may not supervise the location of the poles erected to sustain the telegraph wires of the plaintiff in error and require them to be properly painted and marked so as to be readily identified, and make such inspection of them and of the wires upon them as may be necessary to protect the public welfare, but it is intended to respectfully insist that the license fee imposed by the ordinances here in question is a tax upon, and regulation of, the interstate commerce carried on by means thereof, against which the plaintiff in error is entitled to claim the protection of this Court.

One of the Courts of Common Pleas of Pennsylvania has recently held in the case of the *Township of Lower Merion* vs. *Postal Tel. Co.*, December, 1902, that a *township* can impose and collect a pole and wire license tax, and as this seems to be in accord with the decisions of the Supreme Court of that State already cited, it is plain that

every telegraph pole and every telegraph wire throughout the State is subject to the same tax. And furthermore, it must be remembered that there is *no express legislative authority for the tax in question here*, but the right to impose the same is based entirely upon the general police powers of the municipality, and inasmuch as those general police powers are substantially the same in all parts of the United States, it follows that the same tax can be imposed by all other municipalities throughout the country, and it is therefore evident that telegraph companies will hereafter be subjected to a burden, the weight of which is fixed only by the caprice of the township, borough, and city authorities, and which in the aggregate will exceed all their taxes properly so called, that is to say, all the taxes which can be or are levied upon their property at a fair and just valuation and a rate of taxation which bears equally upon other property.

It is obvious that if the rule adopted in Pennsylvania, and put in practice by a constantly increasing number of her municipalities, is extended throughout that State, and other States, the aggregate of the pole and wire tax thus imposed on telegraph companies will be enormous, indeed, it is confidently asserted that in that case it would exceed all other taxation to which they are now subject, and exceed all their net revenue.

Even as the matter now stands, the total amount of these taxes has assumed very grave proportions and is yearly increasing, and inasmuch as the Courts of Pennsylvania have imposed no restrictions upon the amount that the municipalities may thus impose, and have refused to hold them bound by the restrictions established by the authorities in respect to such license charges upon other kinds of property or occupations, it leaves the Telegraph Company helpless, except in so far as the Federal Courts will protect its interstate business by establishing some rule to which the municipalities must conform.

That rule must be that if such charges are permissible at all, they must be limited as in cases of State inspection laws to such charges "as may be absolutely necessary to execute such laws." Constitution of the United States,

article 1., section 10. The ordinances here in question conflict with such rule and are void.

III.

That the charge sued for is imposed under and sought to be justified as an exercise of the police power of the municipality, is so clearly stated in the opinion of the United States Circuit Court of Appeals, already cited, and in the opinions of the Supreme Court of Pennsylvania above quoted or referred to, as perhaps to need no further comment, but in view of the importance of this case to the plaintiff in error, it may be well to point out that the charges sued for here can be sustained, if at all (which we deny), only as police regulation in fact as well as in form—that the City is without power to impose them otherwise.

It cannot be in any way sustained as a property tax, because—

(*a.*)

It is clearly shown by the record that there has been no assessment of the property taxed which is a necessary preliminary to valid taxation.

The defense pleaded showed that the company had paid all taxes upon its capital or property required by the laws of the State. (Record, page 15.)

(*b.*)

Under the law of Pennsylvania the property of the Telegraph Company necessary to the exercise of its franchises is not taxable by the municipality. The principle which is recognized in all the cases in Pennsylvania is that the public works of a corporation used as such, with their necessary appurtenances, which are essential to the carrying out of the public purposes of such corporations and the value of which is included in the capital stock which is taxed by the State, is not taxable by the municipality, for the reason that the State has never authorized such

taxation by the municipalities; but, on the contrary, has reserved this to itself. In point of fact, the State of Pennsylvania derives more than one-half of its revenues from taxes on the capital stock, gross receipts, and bonded debt of corporations, and pays back to the counties more than one-third of its revenues so derived.

Lehigh Company *vs.* Northampton County, 8 Watts & Sergt., 334;

Railroad *vs.* Berks County, 6 Pa. St. Rep., 70;

Schuylkill Nav. Company *vs.* Berks Co., 11 Pa. St. Rep., 202;

New York *vs.* Erie Ry. Co. *vs.* Sabine, 26 Pa. St., 242;

West Chseter Gas Co. *vs.* Chester County, 30 Pa. St., 232;

Light & Heat Co. *vs.* Elk County, 191 Pa. St., 465.

(*c.*)

Nor can the charge in question be sustained as a rental or compensation to be paid by the Telegraph Company to the municipality for the privilege of occupying its streets, and the decisions of this court in the cases of the City of St Louis against the Western Union Telegraph Company do not apply to or in anywise sustain the claim of the City of Philadelphia in this case.

As these cases are likely to be referred to it may be well to consider them fully.

The City of St. Louis passed an ordinance, viz.:—

> "From and after the first day of July, 1884, all telegraph and telephone companies which are not by ordinance taxed on their gross income for city purposes, *shall pay to the City of St. Louis for the privilege of using the streets*, alleys, and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys, and public places in said city."

The Western Union Telegraph Company having declined to pay this charge suit was brought therefor, which was tried in the Circuit Court of the United States at St. Louis without a jury, and the Court there held, that—

> "The object of the enactment was evidently to secure revenue for the municipality; hence the burden imposed is a tax, *and it is imposed in such form that it can only be regarded as a privilege or license tax* which the City has no authority to impose. Judgment will be entered for defendant."
>
> St. Louis *vs.* Western Union Tel. Co., 39 Fed. Rep., 59.

Upon error this Court held:—

> "And first with reference to the ruling that this charge was a privilege or license tax. To determine this question we must refer to the language of the ordinance itself, and by that we find that the charge is *imposed for the privilege of using* the streets, alleys, and public places, and is graduated by the amount of such use. *Clearly, this is no privilege or license tax.* The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the City—*that which may properly be called rental.* * * * Whether the City has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation or upon its business or for the privilege of doing business is thus disclosed by the very terms of the section. *The City has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the City. It is seeking to collect rent.*"
>
> St. Louis *vs.* Western Union Tel. Co., 148 U. S., 92, 97-98.

But this Court also added:—

> "Indeed, it may be observed, in the line of the thoughts heretofore expressed, *that this charge is one in the nature of rental; that the occupation by this Interstate Commerce Company of the streets cannot be denied by the City;* that all it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is a reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."
>
> St. Louis *vs.* Westn. Un. Tel. Co., 148 U. S., 92-105.

A petition for a rehearing of this case was filed upon the ground that the City of St. Louis had no such interest in and control over the streets as authorized it to impose a charge in the nature of rental for the exclusive use of portions thereof.

This Court filed an opinion denying said petition, and therein said:—

> "Control over the streets resides somewhere. As the legislative power of a State is vested in the legislature, generally that body has a supreme control, and it delegates to municipal corporations such measure thereof as it deems best. The City of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter, under express authority from the people of the State given in the Constitution, * * * and this charter is an organic Act, so defined in the Constitution, and it is to be construed as organic Acts are construed. The City is in a very just sense an '*imperium in imperio.*' Its

powers are self appointed, and the reserved control existing in the General Assembly does not take away this peculiar feature of its charter."

City of St. Louis *vs.* Western Union Tel. Co., 149 U. S., 465-467.

The case was retried by the Circuit Court without a jury, and it was again found that even as rental the sum charged was excessive and judgment was given for the defendant.

St. Louis *vs.* Western Union Tel. Co., 63 Fed. Rep., 68.

An appeal was taken by the City to this judgment, but the judgment was finally confirmed by consent.

But the City of Philadelphia has no such power as has the City of St. Louis. The Constitution of Pennsylvania, article XVI., section 12, provides:—

"Any association or corporation, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and the General Assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section."

Pursuant to this mandate the Legislature of Pennsylvania, by Act of 29th April, 1874, section 33, P. L., 92, provided for the incorporation of telegraph companies, and that when incorporated they should be authorized—

"To construct lines of telegraph along and upon any of the public roads, streets, lands, or highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the cords or wires of such lines; but the same shall not be so constructed as to incommode the public use of said roads, streets, or highways, or injuriously interrupt the navigation of said waters."

This not only does not confer upon the City the right to exact a license fee for the use of the streets, but it excludes the right to require such a fee or to pass the ordinances here in question.

It will thus be seen that the construction and maintenance of telegraph lines within the State of Pennsylvania, including the cities thereof, are directly authorized by the Constitution of that State, and that the power given to the Legislature in respect thereto is that of "reasonable regulation" only. Clearly, the powers of the City of Philadelphia are likewise restricted in the same way.

That this legislative authority is all that is needed, and that the municipalities cannot restrict or interfere with the same is plain. The line of decisions in Pennsylvania is uniform that the Commonwealth owns the franchise of every highway, and that no municipal corporation has any power over them except in so far as it is delegated to it by the State.

> "To the Commonwealth here as to the King in England belongs the franchise of every highway as a trustee for the public, and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, canals, or public roads laid out by the authority of the Quarter Sessions. In England a public road is called the 'king's highway,' and though it is not usually called the 'Commonwealth's highway' here, it is so in contemplation of law, for it exists only by force of the Commonwealth's authority."

O'Connor *vs.* Pittsburgh, 18 Pa. St., 187-189.

> "The power of the legislature to establish a turnpike gate in the streets or public ways of a city is hardly to be questioned; it is a part of the eminent domain which belongs to the sovereign authority. It is conceded to the General Assembly by the grant

of all legislative power, and is not restrained by the Bill of Rights. There is nothing in the street of a city or town to make it greater or more distinguished than a highway in the rural districts except convenience and the density of population, and these restrain not the power of legislation. The power of making and repairing roads and removing nuisances is granted by law to supervisors of highways under the direction of the Courts, and they are bound to do it; yet this does not prevent the legislature from authorizing turnpikes and the erection of gates on these roads. Neither does the obligation of cities to open and repair streets interpose any barrier against the right of the sovereign power to regulate its highways, and streets in a town or city are nothing more."

Stormfelt *vs.* Manor Turnpike Co., 13 Pa. St., 555-559.

"In the present case the right to lay the track upon any public road then opened or thereafter to be opened is expressly given without any qualification, and hence the consent of the Borough of Millvale to the construction and operation of the road over its streets need not be obtained and is a matter of indifference. * * * This being so, it will be seen at once that the Borough has no control over the construction or operation of the road within its limits. *The power of the defendant in the exercise of its franchise is altogether independent of the Borough, and is of just as high and authoritative origin as the right of the Borough to exist at all.* The rights of both are derived from the same source, to wit, the legislative power of the Commonwealth, and the company is not subject to the slightest obligation to go to the Borough for consent to exercise any part of its corporate franchise. Any other doctrine would subordinate the corporate franchise of the defendant to

the will of the Borough Councils, and cannot be sanctioned for a moment."

Millvale Bor. *vs.* Evergreen Ry. Co., 131 Pa. St., 1-23-24.

"The right of the Supreme legislative power to authorize the building of a railroad on a street or other public highway is not to be doubted. * * * If such conversion of a public street to purposes for which it was not originally designated does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood."

Commonwealth *vs.* R. R. Co., 27 Pa. St., 339-354.

The rule in Pennsylvania in this regard is indeed so thoroughly settled that it is not necessary to multiply citations. Other and equally strong expressions will be found in—

Case of Philadelphia & Trenton R. R. Co., 6 Wharton, 25;
Commissioners *vs.* Gas Co., 12 Pa. St., 318;
Mercer *vs.* Pittsburgh, &c., Ry. Co., 36 Pa. St., 99;
Danville, &c., R. R. Co. *vs.* Commonwealth, 73 Pa. St., 29;
City of Pittsburgh's App., 115 Pa. St., 4;
Williamsport Pass. Ry. Co.'s App., 120 Pa. St., 1;
Homestead Street Ry. *vs.* Pittsburgh, &c., Ry. Co., 166 Pa. St., 162.

The result of these authorities is thus summarized by a text writer of authority:—

"By virtue of its authority over public ways, the legislature may authorize acts to be done upon them,

or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies to use or occupy streets and highways for their respective purposes. And it may be here observed that whatever the legislature may authorize to be done is, of course, lawful, and of such acts, done pursuant to the authority given, it cannot be predicated that they are nuisances. If they were such without, they cease to be nuisances when they have the sanction of a valid statute. As respects the public or municipalities, there is no limit upon the power of the legislature as to the uses to which streets may be devoted."

2 Dillon Mun. Corp., section 657 (3d ed.).

It is perfectly clear, therefore, that in Pennsylvania there is no power in a municipality to impose any charge upon telegraph companies by way of rental for the use of its streets, because they are expressly authorized by the Constitution and laws of that State to occupy the highways with their poles and wires, and it is the State and not the municipality which has exclusive jurisdiction and control over the streets of the City, as of all other highways.

It will, therefore, be seen that in the St. Louis cases when the Court below held that the charge imposed was a license tax and unreasonable, and therefore void, the judgment was reversed by this Court upon the ground that the charge was *not* a license tax at all, but was a *rent* for the use of the space occupied by the poles in the highways, which, under the Constitution of Missouri, peculiar in that respect, the City of St. Louis had a right to impose, but that, inasmuch as "*the occupation by this interstate commerce company of the streets cannot be denied by the city,*" it was for the trial Court to determine whether the rental charged was reasonable; and it furthermore appears that upon a retrial of the case in conformity with the instruction given by this Court, the Court below again

decided that, as a rental, the charge was unreasonable, and this judgment, although at first appealed from, was finally acquiesced in by the City.

The City of Philadelphia, however, has no power to impose any charge by way of rental; and if this Court will control the City of St. Louis in the exercise of its right as land owner to charge rent to this plaintiff in error, *a fortiori*, it will control the City of Philadelphia in imposing upon it a license charge for the privilege of maintaining the poles and wires necessary to conduct its business of interstate commerce—in the "nature of postal service"—under the guise of a police regulation.

IV.

Nor can the plaintiff in error be held to pay the charge imposed in this case for the purpose of providing an insurance or guarantee fund to insure the municipality from damages for which it may be held liable by reason of the construction and maintenance of telegraph poles and wires.

This seems, however, to be the controlling thought in the decisions of the Supreme Court of Pennsylvania, which hold that the usual, ordinary, or necessary, expense of issuing licenses, &c., makes no provision for the liability imposed upon the City by the erection of telegraph poles, and that as it is the duty of the City to see that the poles are safe and properly maintained—

> "Should a citizen be injured *by reason of the neglect of such duty*, an action might lie against the city for the consequences of such neglect."
>
> Chester City *vs.* Western Union Tel. Co., 154 Pa., 464 (*supra*);
>
> Phila. *vs.* American Union Tel. Co., 167 Pa., 406 (*supra*).

It will no doubt be urged, in justification of the reasonableness of the charge imposed in this case, that in the event of injury to person or property from the improper construction or maintenance of a telegraph pole

or wire, the municipality would be liable therefor, and that it therefore has the right to protect itself therefrom by imposing such license charges upon the plaintiff in error as will provide a fund for the payment of such possible damages.

Inasmuch, however, as the municipality cannot exclude the Telegraph Company from occupying its highways with their poles and wires, as declared by this Court in Telegraph Co. *vs.* Telegraph Co., 96 U. S., 1, and again in St. Louis *vs.* The Western Union Tel. Co., 148 U. S., 92-98, *supra*, and as is expressly permitted by the Constitution of Pennsylvania, it is plain that such municipality cannot be in any way held liable merely because such poles and wires are constructed and maintained upon its highways. It therefore follows that any liability which may be imposed upon the municipality by reason thereof, can of necessity arise only from the neglect of the municipality itself to properly exercise its police power to inspect, regulate, and supervise the construction and maintenance of such poles and wires. Indeed, this is expressly so stated by the Supreme Court of Pennsylvania in Chester *vs.* West. Un. Tel. Co., just cited.

But it is respectfully insisted that it cannot be that a municipality has the right to impose upon a Telegraph Company the cost to the City of its supervision and regulation of the property of that Telegraph Company, and at the same time and in addition thereto collect from it other sums of money to reimburse it for damages to which it may be subjected by reason of the insufficiency of the regulation and supervision which it has undertaken, or the negligence with which it has performed the duty it has assumed in that behalf, and the cost of which it has already imposed upon and collected from the Telegraph Company. In other words, the Telegraph Company cannot be made to insure the municipality against liability for its own negligence.

And furthermore, in case of injury to person or property by negligence in the construction and maintenance of telegraph poles and wires, the Telegraph Company would

itself be primarily liable to the party injured, and certainly cannot call upon a municipality to repay to it any damages which it might be held to pay in such case, although it had, through the payment of license charges, provided a fund for such purpose. Nor will the telegraph company, after having itself paid the damages, be entitled to ask the return to it of the moneys which it had already paid to the municipality as its insurance against liability for such injury. And again, is it not clear that, in case of injury to person or property by the negligent construction or maintenance of telegraph poles and wires for which the municipality is held liable, such municipality can maintain its action therefor against the Telegraph Company?

If, therefore, the Telegraph Company is itself liable to any person injured by reason of the negligent construction and maintenance of its poles and wires, and is liable over again to the municipality if the municipality is held liable for such negligent construction and maintenance, and if the payment of the license charge in question does not operate to exonerate the Telegraph Company from such liability, it would seem to follow that the municipality cannot sustain the charge upon that ground, and especially that it cannot do so where its liability, that is to say, the liability of the municipality, clearly cannot arise except by reason of its own negligence in the exercise of its police power of regulation and supervision.

During the seven years sued for in this case the total of these pole and wire taxes amounted to $118,864.77 (Record, page 59); and yet no evidence was offered or attempt made to show that during all those years the City had ever been put to any expense whatever by reason of any injury caused by such poles and wires. If any such expense had been incurred, the knowledge and the evidence of it was with the City, and the failure to prove, or, indeed, even to aver, that any such had been incurred, affords the presumption that none such were incurred. The law draws its inferences from experience and not from imagination, and when for seven years no liability has

accrued it would seem to be necessarily inferred that no danger of liability exists.

"To what extent the police power of a State may be exerted on traffic and intercourse with the State without conflicting with the commerce clause of the Constitution of the United States, has not been precisely defined. In the case of Henderson *vs.* Mayor of New York, 92 U. S., 259, it was held that the statute of the State, which, aiming to secure indemnity against persons coming from foreign countries becoming a charge upon the State, required ship owners to pay a fixed sum for each passenger—that is, to pay for all passengers—not limiting the payment to those who might actually become such charge was void. Whether the statute would have been valid if so limited was not decided."

Per McKenna, J., Smith *vs.* St. Louis & S. W. Ry. Co., 181 U. S., 248-253.

"The City cannot collect and lay by a sum to insure itself against imaginary future demands which may possibly arise. If it properly discharges its duty of control and supervision no such demands can arise. It is responsible alone for vigilance and care in these respects. It may, possibly, at some time be subjected to expenditure in resisting such claims. This, judged by the past, is not probable. A very trifling annual surplus would provide for it. But, as the contingency is remote, such provision may well be left until it occurs."

Philadelphia *vs.* West. Un. Tel. Co., 40 Fed. Rep., 616.

V.

If, however, the City has, under its police power, not only the power to regulate the construction and maintenance of the poles and wires of interstate telegraph companies which have accepted the Act of Congress of July

24th, 1866, but has also the power to impose a charge upon said companies on their poles and wires under said police power (which we deny), still it is well settled that under such police power the City can only impose a license tax within certain well-defined limits, to wit, the necessary inspection expenses incurred by it in such lawful regulation and inspection of the telegraph poles and wires.

As already noted, it must be constantly remembered that the power to tax and the power to regulate are entirely distinct powers. It is true that both may be vested in the States as an attribute of their sovereignty, but most distinctly and emphatically it is not true that both are vested in municipalities—municipalities have no power to tax except as expressly conferred by the State, and that the City of Philadelphia has no power to tax the poles and wires of the plaintiff in error has already been most conclusively shown in another part of this brief.

Conceding, for the purposes of this part of the argument, that a municipal corporation has the power of police regulation, and that as part thereof it may impose a charge to reimburse itself the expense of such regulation, the concession must be accepted as limited: so far as the authorities concede such power to impose a charge at all, they all concur in restricting the power within the limits above stated, to wit, the reimbursement of the municipality of the expense of the regulation. Thus far some of the cases go—none of them go any further.

This restriction is, indeed, self-evident, because inasmuch as the power to tax and the power to regulate are different powers, it must necessarily follow that a charge imposed under the police power, or as part of a police regulation, must be limited to the necessity of its exercise; otherwise it ceases to become a regulation and does become a tax.

Consequently, the rule limiting the amount of a charge imposed under and in aid of the police power is well established to be the amount of the cost of such supervision and regulation and the cost of issuing the license, and under the power to license, express or implied, it is

clear that no right exists to impose a larger charge than will reimburse to the municipality the expense of regulation.

> "A right to license an employment does not imply a right to charge a license fee therefor with a view to revenue, unless such seems to be the manifest purpose of the power; but the authority of the corporation will be limited to such a charge for the license as will cover the necessary expenses of issuing it and the additional labor of officers and other expenses thereby imposed. A license is issued under the police power, but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation, and the charter must plainly show an intent to confer that power, or the municipal corporation cannot assume it."
>
> Cooley on Const. Lim., page 242 (6th ed.).

But this principle is not applicable to interstate commerce, especially when actually regulated by Congress and license fees cannot be imposed.

> "The terms in which a municipality is empowered to grant licenses will be expected to indicate with sufficient precision whether the grant is conferred for the purposes of revenue, or whether, on the other hand, it is given for regulation merely. * * * Where the grant is not made for revenue, but for regulation merely, a much narrower construction is to be applied. A fee for the license may still be exacted (that is, if the power to license has been expressly granted to the City, which is not the case here), but it must be such a fee only as will legitimately assist in the regulation, and it should not exceed the necessary or probable expense of issuing the license and inspecting and regulating the business which it covers."
>
> Cooley on Taxation, pages 597, 598 (2d ed.).

> "The power to license and regulate particular branches of business or matters is usually a police power, but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes."
>
> Dillon on Mun. Corp., section 768 (3d ed.).

The charter of the city of Portland authorized it "*to control and regulate slaughter houses, wash houses, and public laundries and provide for their exclusion from the city limits or from any part thereof,*" and under that authority the city council passed an ordinance "*to license and regulate wash houses and public laundries,*" providing, *inter alia*, for "*a quarterly license of five dollars*" thereon.

Payment of this charge was resisted upon the ground that a fee of five dollars a quarter for a license to keep a wash house was manifestly a mere pretense for imposing an onerous tax on the business.

After citing and commenting upon numerous authorities, the court said:—

> "It follows that if the sum required of the petitioner by this ordinace is intended for revenue, and not merely regulation, the same is so far void. A fee may be required for a license merely as a means of regulation, but the amount must not be more than is necessary to cover the cost of issuing the license and for the incidental expenses attending the regulation of the business."
>
> Laundry License Case, 22 Fed. Rep., 701.

But the regulation must be one compatible with the commerce clause and the legislation of Congress.

The distinction between a license tax based upon the cost of regulation and a tax which, although called a license tax, and although imposed on a proper subject for a license tax, is, nevertheless, fixed upon the basis of some remuneration to the city, is very clearly pointed out in a case where the charter gave the Councils of Hoboken

power "to regulate the building of vaults and laying of water and gas pipes in and under the streets, and to secure to the public the safe and convenient use of the streets," and an ordinance provided that persons desiring to build vaults under the streets must first get authority of Councils, and must *pay a certain sum per square foot of space* occupied by said vault; plaintiff got a permit to dig a vault and was assessed under the ordinance. The court held much of the ordinance to be valid, but said:—

> "The exaction in question, graduated by the capacity of the vault, is in no sense a regulation such as is contemplated by the provisions of the charter. It is a tax or assessment upon the owner or occupier of lands for permission to improve the same for their more convenient use.
>
> "In the classification of corporate powers, the distinction between the power of taxation and the usual police powers, which are granted for the maintenance of peace and good order in the city, and the administration of its internal affairs, is well settled. The functions of the latter are not primarily the raising of revenue.
>
> "Incidentally, the public treasury may be benefited, as by the imposition of fines or penalties for the violation of city ordinance, by license fees when the power is specifically to license and exact license fees; or under the power to regulate markets by the exaction of market fees for the use of the corporate property. But in all such cases the court must see that the penalty or the requirement of fees for the exercise of privileges is a reasonable exercise of the power of legislation granted to the corporation. * * * The license fee here is not authorized as a mode of taxation; is not a reasonable exercise of the power of regulating the police of the city, and hence is void."
>
> State *vs.* Hoboken, 4 Vroom, 280-282.

Where the city of Hoboken by ordinance imposed a license tax on passenger railway cars, it was held:—

> "Under the power simply to regulate an ordinance cannot be passed to tax for revenue purposes. In the course of the administration of such a power the public treasury may be incidentally benefited by the imposition of fines and penalties, but in all such cases the amounts imposed must be such as are reasonably necessary to accomplish the regulation."
>
> North Hudson Ry. Co. *vs.* Hoboken, 41 N. J. L. (12 Vroom), 71.

The city of Saginaw passed an ordinance providing for the inspection and regulation of poles for the support of electric light wires and as incidental thereto imposed a license charge of fifty cents a pole a year, but the Supreme Court of Michigan distinctly admitting that the provision for regulation and inspection was a proper exercise of the police power of the city and expressly authorized by the laws of the State, yet adverting to the fact that the light company paid the taxes upon its property imposed by the laws of the State held that the police tax must be restricted to the cost of the police regulation, and as it deduced from the evidence that the cost of the regulation did not exceed one-tenth of the amount of the tax, reversed the court below and held the ordinance void so far as it imposed the tax aforesaid.

Saginaw *vs.* Swift Electric Light Co., 113 Mich., 660.

That under the guise of the power to regulate, a city cannot exercise the power to tax, is too well settled to require the citation at length of further authorities. It is sufficient to refer to

New York *vs.* 2d Ave. R. R., 32 N. Y., 261;
Cincinnati *vs.* Bryson, 15 Ohio, 625;
Mays *vs.* Cincinnati, 1 Ohio St., 268;
Dunham *vs.* Rochester, 5 Cowen, 462.

"Therefore, the power to tax (using the word in its strict and proper sense, as a means of raising municipal revenue) cannot be inferred from the general welfare clause in a charter. * * * *Nor is it included in the police power.*"

Jackson *vs.* Newman, 59 Miss., 385. Dillon's Municipal Corporations, section 764.

"A municipal corporation as such has no inherent power to grant licenses or exact license fees; it must derive all its authority in this regard from the State, and the power must come by direct grant and cannot be taken by implication."

Cooley on Taxation, 597 (2d ed.).

"A *license* is a right granted by some competent authority to do an act which, without such authority, would be illegal. A *tax* is a rate or sum of money assessed upon the person, property, &c., of the citizen."

Cooley on Taxation, 573 (2d ed.).

"The word 'license' means permission or authority; and a license to do a particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize."

Per Chief Justice MARSHALL, in Gibbons *vs.* Ogden, 9 Wheat., page 213.

VI.

It seems to be plain upon the evidence that the tax imposed by the City in this case exceeds the limits thus prescribed by the authorities.

The charge imposed is one dollar per telegraph pole per annum and two dollars and fifty cents per mile of telegraph wire per annum, which, counting thirty-seven poles to the mile and twenty-five wires on the poles (Record,

page 48) amounts to a tax of three dollars and ninety-eight cents ($3.98) per mile of wire. The City produced no evidence showing or tending to show any expenditure by it incident to the issuing of the license and the expense of the inspection, regulation, and police surveillance exercised by it over the poles and wires of the company, and rested its case entirely upon the presumption of the reasonableness of the charge made, said to arise from the fact that the municipality had imposed it.

The telegraph company then produced evidence tending to show that the City exercised no supervision whatever over its poles and wires, and that except the issuing of license therefor it did nothing whatever in respect thereto.

Under such circumstances it was manifestly impossible for the telegraph company to show exactly what amount of expense the City incurred in respect to the supervision and regulation of telegraph poles and wires, and the City itself was apparently unable to do so, but the telegraph company did show that the average cost for a period of years of maintenance and keeping in repair the poles and wires of the Western Union Telegraph Company, of which the line in question here is part, including therein of necessity the cost of the inspection thereof as well as the cost of the new poles, wires, cross arms, insulators, and other material used in and of the labor employed in doing the work was only one dollar and sixty and three-sevenths cents ($1.60 3/7) per mile of wire per annum, while the city's charge for inspection alone amounts to three dollars and ninety-eight cents ($3.98) per mile of wire per annum—or more than twice as much—which evidence and comparison, Dallas, Circuit Judge, in a similar case considered "very striking and cogent." (82 Federal Rep., 797.)

The telegraph company further showed the very trifling nature of the alleged service performed by further showing that the whole number of permits issued during the years in question was quite inconsiderable, varying from two hundred and fifty in 1886 up to five hundred and

thirty-four in 1891, and further proved by the head of the Department, that no man or boy about the Electrical Bureau of the City could have been dispensed with had it been relieved of the duty of issuing such permits, and it was also conclusively proved that the license charges imposed under the ordinances in question were for the seven years covered by this suit some $7000 more than the total expenses of the Electrical Bureau for the salary of its Chief and all his assistants, clerks, foreman, and linemen and horse and wagon.

For the year 1885 the total charges were $16,942.50, while the whole expense of the Bureau for salaries of the chief and his assistants, clerks, foreman, and lineman was only $8100, or less than half as much as the license charges, and although the expenses of the Bureau increased from year to year, until in 1891 they were $24,630, yet this increase was fully accounted for by the large and rapid growth of the City's own poles, wires, and underground conduits, of which latter the Bureau built some two million feet, say three hundred and seventy-eight miles, not only for the use of the City, but also for rental by it to the companies.

No evidence was offered to show that the City incurred any expense in its police department in respect to the poles and wires. It is true that some mention was made of the "work" of said department in relation thereto, but upon examination it will be seen that it amounts to nothing more than that a blank form was required to be filled up by each police officer specifying, among the other things, that he should report—

> "leaning telegraph poles, detached, broken or sagging wires"

observed by him upon his beat, along with signs, awning posts, fallen trees, broken manhole covers, &c.

But there was no allegation whatever that a single police officer could have been dispensed with had this duty not been imposed upon the force. Nor was there even any evidence that at any time any police officer had

found or reported a "leaning telegraph pole or a detached, broken, or sagging wire."

In respect to the Fire Department, there was some testimony that telegraph poles and wires occasionally inconvenienced the firemen in dealing with fires, but there was no allegation, much less evidence, that any extra expense had been incurred by reason of their presence, or that the employment of any larger number of men or apparatus was rendered necessary thereby. The City's main witness only mentioned this department as having anything to do with the subject as "*from the standpoint of inconvenience*" (Record, page 51), from which standpoint, however, no right to levy a tax can be discerned. It is conceded that the poles and wires are lawful and indeed necessary structures, and therefore no tax can be imposed upon them upon the ground that they are nuisances.

Briefly, then, although it might be inferred from the evidence that the City had been put to some expense in a proper supervision and regulation of the company's poles and wires within her limits, by the employees of the Electrical Bureau, yet there was no evidence whatever of any specific item of such expense, and it was plain that whatever service in this behalf was imposed upon the Electrical Bureau was but a very inconsiderable portion of the total services rendered by that bureau.

In the absence of evidence of any specific item of expense, it is respectfully insisted that the presumption of reasonableness arising from the passage of the ordinance was conclusively rebutted by the affirmative and uncontradicted evidence on the part of the defendant that the charges imposed amounted to more than twice the cost of maintenance, renewal, and repair of the poles and wires charged for, which necessarily included the inspection and regulation thereof, and that the total charges imposed were more than equivalent to the whole office expense of the department for the years for which the license tax was sued for, while that department was charged with many other onerous and responsible duties, with reference to the City's own property; and that the

uncontradicted evidence also shows that the amounts charged in this case under the guise of a police regulation far exceed, and were indeed many times the multiple of, any expense which the City could have incurred in connection with the inspection, regulation, and supervision of the poles and wires.

Furthermore, while the title of the ordinance of 1881 (Record, page 26) imports a police regulation, the title of the ordinance of 1883 (Record, page 28) does not so import, but, so far as concerns overground wires, professes to be for the purpose "*to provide for charges for underground, overground, or overhead wires,*" and examination of the ordinance shows no provision whatever for the regulation or inspection of such overground or overhead wires, and that the only provision therein relating thereto is the imposition of the tax of two dollars and fifty cents per mile per annum.

The purpose of this last-mentioned ordinance was proved by the head of the department, upon examination by the counsel for the City, to have been "*as an inducement to them* (the telegraph companies) *to place their wires under ground*" (Record, page 65), thus confirming the inference, irresistibly to be drawn from the testimony, that the charge imposed was intended to be for a purpose other than the mere reimbursement of the City for its expenses in this behalf incurred.

Such a tax finds no justification even in the police power, because there is no regulation or supervision provided for, but only the bald tax imposed, which therefore is clearly invalid.

Section 7 of Ordinance of 1883 (Record, page 30) provides:—

> "That on all conductors or wires suspended above ground * * * an annual payment of two dollars and fifty cents per mile, or any part thereof, in length of wires or conductors, for each and every wire or conductor used, or to be used, for telegraphic, telephonic, or other purposes."

This is as clearly a mere tax as was the ordinance of the Port of Mobile, "that the license tax for the year from the 15th of March, 1883, to the 15th of March, 1884, be and the same is hereby fixed as follows: On telegraph companies, $225," which this Court declared to be invalid.

That the City has no right to impose the tax in question as an inducement to the Telegraph Companies to place their wires underground, was conceded by the Circuit Court of Appeals in this case.

> "We are not prepared to say that the Court erred in refusing the plaintiff's second point. That proposition, it will be perceived, does not touch the right of the City, by direct legislation, to compel all private persons and corporations to place their wires underground, but asserts the right of the City to impose license charges in excess of all the expenses incurred by the municipality because of the presence of poles and overhead wires in the streets, although they are lawfully there."
>
> Philadelphia *vs.* Atlantic & P. Tel. Co., 102 Fed. Rep., 254-257.

> "The tax in question seems to me to indicate upon its face that it was not imposed *bona fide* for the privilege of using the streets, but was intended either as a tax upon the franchise of the Company, or for the purpose of driving its wires beneath the ground. While the latter object may be a perfectly legitimate one, I consider it a misuse of the taxing power to seek to accomplish it in this way. I am therefore, constrained to dissent from the opinion of the Court."
>
> Mr. Justice Brown dissenting: St. Louis *vs.* Western Union Tel. Co., 148 U. S., 92-107.

VII.

The case should have been submitted to the jury, and the judgment should be reversed, because it was not so

submitted. The Courts of Pennsylvania and the Circuit Court of Appeals for the Third Circuit all concur in stating that the license fee must be reasonable, and that to be reasonable it must be limited to the necessary expenses of issuing it and the additional labor of officers and other expenses thereby incurred, but seem to consider that the possible liability for an accident by reason of a defective regulation and inspection is ground for an addition, undefined in amount, to the expenses and additional labor mentioned, but whatever this may be, it is clearly a matter of fact to be determined by the jury under the instructions of the Court.

It is said that there is a presumption of propriety in the tax because there is generally a presumption that the public acts of public officers have been duly performed, and discretion committed to them duly exercised. Under the circumstances of this case this presumption is somewhat of an anomaly, but, passing that, all that such presumption can mean is that the ordinance is *prima facie* evidence that the regulation, and the license tax thereto appended, are reasonable; it certainly does not allow the municipal authorities to follow a mere "rule of thumb," but assumes that they have fairly ascertained, considered, and calculated what amount of extra expense has been incurred by the municipality because of the reasonable exercise of the power of regulation conferred upon it, and that the amount of the tax has been made to conform thereto.

That the exercise of this discretion is subject to the supervision of the courts is, however, conceded in all the cases cited or referred to, and it therefore follows that although it may not be necessary for the municipal legislature to set forth its reasons for fixing the police tax at the amount they do, yet, nevertheless, it is equally plain that the Courts must ascertain for themselves whether all the facts and circumstances justify the municipal conclusion; otherwise the judicial supervision would be obviously without meaning or efficiency.

To enable the Court to determine this the City put in evidence the ordinances themselves as *prima facie*

proof of the imposition and reasonableness of the tax. Thereupon the Telegraph Company offered evidence to show exactly what the regulation and supervision were that the City exercised over it, and the cost of the only Department through and by which it was exercised. The Company did not attempt to show what amount of supervision might, could, or should have been exercised over it, which, of course, would have been a mere matter of opinion, but, as stated, did show exactly what the City had actually done, to wit, as testified by Mr. Gill, nothing.

> "Q. During that time what regulation or supervision did the City of Philadelphia exercise over those poles and wires?
>
> "A. None. The supervision and regulation is looked after by the Telegraph Company itself." (Record, page 36.)

If this evidence was believed, then there was no right on the part of the City to impose the tax in question, because the expense of issuing the permit for the erection of the poles and wires had been covered by the fee of five dollars per pole charged therefor, and after that, according to the testimony, nothing whatever was done by the City in relation thereto.

If it be said that the rebutting evidence in the case tended to show that the City did incur some expense in the matter, then, without criticising the paucity and vagueness of it, there was an issue of fact raised as to which the testimony directly conflicted, and the jury became, of course, the proper tribunal to decide such issue.

The question is, What is a proper police tax as part of a police regulation? and that is, at most, the cost of issuing the license of making the inspection, and of enforcing the regulation, in view of all the facts and circumstances of the particular case. The municipal legislature is to determine this in the first instance, and having fixed a tax which it deems reasonable, but which is subject to be reviewed by the courts, then, when the reasonable-

ness of the tax does come to be determined by the courts, if the supervision of the courts means anything, it must mean that the court must itself ascertain and determine, in view of all the facts and circumstances, first, whether the police regulation is a reasonable one; and, second, what amount of police tax will recoup the municipality for the cost and expense thereof.

Therefore, when the Telegraph Company showed that the license to erect the poles and wires was already paid for, and that no supervision or regulation, certainly none which entailed any expense, was thereafter exercised or incurred by the City, the burden of proof was shifted to the City to contradict this evidence and show if it could what in fact it had done and what in fact had been the expense of doing it.

When, therefore, the City gave evidence tending to show that its linemen did observe the poles and wires of the Telegraph Companies while working upon the poles and wires of the City, and that it was their duty to make report of anything they saw amiss therein, while it may be that the jury may have inferred therefrom that some expense was in fact incurred by the City; yet, nevertheless, this presented a question of fact which, like all other questions of fact, should have been submitted to the jury for its determination.

This question was submitted to the jury on the trial of the case of the Borough of New Hope *vs.* Western Union Telegraph Company just decided, and it was decided by the Circuit Court of Appeals for the Third Circuit in the case of the City of Philadelphia *vs.* Western Union Telegraph Company, 89 Fed. Rep., 454, that it ought to have been so submitted. In point of fact, this question was submitted to the jury upon the first trial of this case, with the result that the jury, notwithstanding the prejudice against corporations, cut the City's claim in two. (102 Fed. Rep., 256.)

But it may be said that we have omitted to mention another item which should enter into the calculation, and that to "such a charge for the license as will cover the

necessary expenses of issuing it and the additional labor of officers and other expenses thereby incurred," there must be added another sum to cover the possible liability of the City in the event that "should a citizen be injured by reason of the neglect (by the City) of such duty, an action might lie against the City for the consequences of such neglect."

Without here repeating all that has been heretofore said against the right to impose upon Telegraph Companies this burden for which no precedent has been cited, and which seems not to be imposed upon any other object, and however vague and undefined it may be, it must be conceded that if the municipality has the right to consider it, it must measure it, and that the only measure to be applied to it is that of experience; it seems impossible to argue that a municipality can impose a burden on an instrument of interstate commerce, which must be borne and paid for by the general public of the whole country using that instrumentality, upon a mere guess as to what may happen in the future without regard to what has happened in the past.

Now, upon that point, that is to say, what liability might possibly be imposed upon the City by reason of the Company's poles and wires, there was no evidence that for a period of seven years continuously—a period equal to the presumption of life—any accident had happened for which even the Telegraph Company was liable, and *a fortiori* for which the City was liable, or had even been alleged to have been liable.

Even if provision for such possible liability of the City, contingent upon its own negligence, can be included in a police tax, it was a question for the jury to say what the amount of such provision should be in view of all the facts and circumstances of the particular case.

It is therefore respectfully insisted that the precedents cited should have been followed in this case, and that the judgment herein should be reversed because the issues of fact presented by the pleadings and testimony were not submitted to the jury for decision.

VIII.

That the plaintiff in error is engaged in interstate commerce and that the business it transacts is in itself commerce, and that by virtue of the Act of Congress of July 24th, 1866, and its acceptance thereof said telegraph company is entitled to all the privileges and immunities and is subject to all the restrictions which flow from the power given to Congress by the Constitution to regulate commerce, and the legislation in that behalf enacted by Congress, is distinctly decided in

Telegraph Co. *vs.* Telegraph Co., 96 U. S., 1;
Telegraph Co. *vs.* Texas, 105 U. S., 460;
Leloup *vs.* Port of Mobile, 127 U. S., 640;

cases which have been so often referred to and reasserted by this court as to need no further comment.

IX.

If therefore it has been shown, as it is believed it has been conclusively shown, that the charge in question has been imposed not only in form, but in reality, in, and as part of, a mere police regulation, and that the amount of the charge sued for in this case has been fixed without regard to the limits which the rules of law define for the right to impose charges under the police power (which otherwise are wholly indefinite), but exceeds those limits, then it follows that the plaintiff in error as an interstate commerce company, whose business is commerce itself, and in the nature of the postal service, has the right to invoke the protection of the Constitution of the United States against this attempt to burden and regulate interstate commerce.

The Constitution of the United States has committed to Congress the power to regulate commerce between the States, and the necessity for this delegation of power, the exclusiveness of the grant, and the vast extent of it, have often been the subject of judicial examination and luminous statement by this Court. Taxation is regulation, and therefore the power of Congress in the premises, broadly

stated, would seem to exclude the States from any power of regulation or of taxation of interestate commerce or its necessary agencies.

On the other hand, to say that the States have the power to make and enforce all regulations necessary for the preservation or benefit of the life, health, comfort, and convenience of their citizens, and to say that they have the unlimited power of taxation over the persons and property, real and personal, tangible and intangible, within their respective jurisdictions, is, after all, to say no more, than that the States did not surrender their sovereignty when they adopted the Federal Constitution; and that the preservation of the autonomy of the States is as necessary to our theory of government as is the due preservation and enforcement of all the powers committed to Congress.

It is to this Court that the power to reconcile these two apparently conflicting principles is committed, and that this is frequently difficult is shown by the great number of cases in which this Court has been invoked to decide whether or not particular regulations and taxes imposed by the States have been within their unsurrendered powers, or, on the other hand, have trenched upon the powers committed to Congress.

Referring to its many decisions upon the subject, and to the fact that so large a proportion of them have been accompanied by strong dissents, this Court has itself said, speaking through Mr. Justice Miller—

> "With reference to the utterances of this Court until within a very short time past, as to what constitutes commerce among the several States, and also as to what enactments by the State legislatures are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the Court who have written opinions for it may not have meant precisely the same thing."
>
> Fargo *vs.* Michigan, 121 U. S., at page 240.

In his opinion in the case of the Reading Railroad Company *vs.* Pennsylvania, commonly called the case of "State tax on Railway Gross Receipts" (15 Wall., at page 299), Mr. Justice Miller said:—

> "I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce."

And if we substitute "intelligence transmitted" for the words "goods transported," we have an authority directly upon the point in controversy in the case now before the Court.

While it may be true that the expression of Mr. Justice Miller, above quoted, was read by him in a dissenting opinion, it nevertheless became in fact the principle adopted by the Court in its unanimous opinion in the subsequent case of Philadelphia & Southern Steamship Co. *vs.* Pennsylvania, 122 U. S., 326.

As has already been noted, the charge sought to be recovered from the Telegraph Company in this case is not imposed under the taxing power, and therefore its decision does not involve the consideration of the extent of that power, nor will a decision against its validity in any wise derogate from limit or qualify the power of the State to tax all property within its jurisdiction, whether used in the transaction of interstate commerce or not.

On the contrary, as has already been shown, the charge sought to be recovered here is one imposed under the alleged inherent power of a municipal corporation to police its highways, and even admitting for the sake of argument that the municipality has power to impose the cost of regulation upon the thing regulated, it follows that such charge must be strictly limited within the bounds prescribed, or otherwise, citizens of other States will be made "to pay a tax, contribution, or toll for the privilege of having their intelligence communicated through" the City of Philadel-

phia "by the ordinary channel" of telegraphic communication, and their constitutional right to such transmission be "needlessly" burdened and regulated.

The current of authority in this Court that it will declare invalid and relieve against any charge which is in its nature or effect a burden upon, and therefore a regulation of, interstate commerce, unless such charge can be justified and sustained as a proper exercise of the taxing power, is so strong and so uniform that it is deemed unnecessary to cite more than a few of its many decisions upon this point.

Where a State statute imposed a license tax upon drummers and others, selling by sample within a certain taxing district, although it made no discrimination between those who represented business houses out of the State and those who represented like houses within the State, it was nevertheless held by this Court to be invalid, for the reason that it was a burden on, and, therefore, a regulation of interstate commerce, and as such unconstitutional.

It is distinctly stated by this court that interstate commerce cannot be taxed at all by the State, and that the fact that the tax is imposed by a law or an ordinance purporting to be an enforcement of the police power, or a privilege tax, can make no difference in the application of the rule.

Robbins *vs.* Shelby Taxing District, 120 U. S., 489.

And this has been since reaffirmed in—

Asher *vs.* Texas, 128 U. S., 129;
Stoutenburgh *vs.* Hennick, 129 U. S., 141;
McCall *vs.* California, 136 U. S., 104;
Brennan *vs.* Titusville, 153 U. S., 289.

An Act of the Legislature of the State of Kentucky, entitled an "Act to regulate agencies of foreign express companies" imposed upon such agents an annual tax of five dollars with certain small fees for the filing of certain papers relating to the business of the company and required to be filed in the office of the auditor of public accounts.

This Court held this tax to be a regulation of interstate commerce and therefore void. The Court said:—

> "But the main argument to support the decisions of the Court of Appeals is that the Act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem necessary for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce.
>
> Crutcher *vs.* Kentucky, 141 U. S., 47-59.

Although the right of a State in the due exercise of its police power to regulate the inspection and sale of articles of food cannot be questioned, yet this court has always been careful to consider whether under the guise of inspection and of the exercise of the power of protection any burden has been laid upon interstate commerce, and if so, whatever the form of the imposition was, the regulation has been declared unconstitutional and void.

Where the State of Missouri passed a statute purporting to regulate the driving of cattle into its territory, this Court said:—

> "It (a State) may not under the cover of exercising its police power substantially prohibit or burden either foreign or interstate commerce. * * * The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. *And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion.*"
>
> Hannibal & St. J. R. R. Co. *vs.* Husen, 95 U. S., 465-472-473;

and the reasoning of this case has been since followed in—

Minnesota *vs.* Barber, 136 U. S., 313;
Brimmer *vs.* Rebman, 138 U. S., 78;
Cotting *vs.* Goddard, 183 U. S., 79;
St. Louis Coal Co. *vs.* Illinois, 185 U. S., 203.

Even where the regulation imposed was in relation to the selling of intoxicating liquors, which is peculiarly a matter of police cognizance, this court has held that the power must be so exercised as not to operate as a burden on or regulation of interstate commerce.

> "And while, by virtue of its jurisdiction over business and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons, and the protection of property so situated, yet the subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State unless placed there by congressional action."

Leisy *vs.* Hardin, 135 U. S., 100, 108;

and to same effect—

Lyng *vs.* Michigan, 135 U. S., 161.

The councils of Titusville, Pa., by an ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville, imposed a license fee of twenty-five dollars a year upon persons canvassing or soliciting within that city orders for goods, books, paintings, wares, or merchandise of any kind, and for a violation thereof imposed a fine not exceeding $100, for a breach of which ordinance one Brennan was convicted and fined twenty-five dollars by the city recorder. The defendant appealed to the Court of Common Pleas, which rendered judgment against him, and then appealed to the Supreme Court of the State,

which affirmed the judgment of the court below, and thereupon sued out a writ of error to this court.

The power of the city of Titusville to levy the license tax in question was clearly given by the Act of the Legislature of Pennsylvania of 22d May, 1874, section 20, clause 4 (P. L., 239), viz.:—

> "*To levy and collect license tax* on auctioneers, contractors, druggists, * * * *and regulate the same by ordinance.*"

This court said:—

> "The ordinance itself is entitled: 'An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville,' and the special section requires a license for transacting business, the license being graded in amount by the time for which it is obtained. This license, therefore, the failure to take out which is the offense complained of, and for which defendant was sentenced, is a license for 'general revenue purposes,' within the very declarations of the ordinance. *Even if those declarations had been the reverse, and the license in terms been declared to be enacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify or the power invoked to sustain the Act of the State, if that Act is one which trenches directly upon that which is within the exclusive jurisdiction of the National Government, it cannot be sustained.*"

Thus in New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650, 661, this court, by Mr. Justice Harlan, said:—

> "Definitions of the police power must, however, be taken subject to the condition that the State can-

not, in its exercise, for any purpose whatever, encroach upon the powers of the general government or rights granted or secured by the supreme law of the land." * * *

"Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an Act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of the long line of decisions, that it is well settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

* * * * * * *

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say it shall not be carried on in this way, and to that extent to regulate it.

Brennan *vs.* City of Titusville, 153 U. S., 289-299, 302-303.

19327

Without repeating the language of this court in others of these cases above cited the result of their reasoning may be summarized to be that the police power of a State and, *a fortiori*, of a municipality cannot obstruct interstate commerce beyond the necessity for its exercise. That the question of whether or not under the guise of the exercise of the police power a burden has been laid upon interstate commerce is always open in this court, and the law or ordinance in controversy will be carefully scrutinized to ascertain whether or not any such burden has in fact been imposed; that any charge upon the agent or agencies involved in the transaction of interstate commerce is a burden upon commerce itself, and cannot be imposed by a State, and, *a fortiori*, by a municipality, without the assent of Congress; and that the silence of Congress in this respect is equivalent to a declaration on its part that it should be absolutely free.

That a license tax, irrespective of whether the amount is much or little, where levied upon the occupation itself, or upon the means of carrying on the business, is, where the business carried on is interstate commerce, a direct burden upon interstate commerce, has been abundantly settled by the adjudications of this court.

Thus, where an importer was required to take out a license and pay a fee of fifty dollars therefor before he was permitted to sell a package of imported goods, it was said:—

> "All must perceive a tax upon the sale of an article imported only for sale is a tax on the article itself. * * * So a tax on the occupation of an importer is in like manner a tax on importation."
>
> Brown *vs.* Maryland, 12 Wheaton, 419-444.

> "Where the business or occupation consists in the sale of goods the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy,

> it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license. * * * The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States, or in this court, to control its action, however unreasonable or oppressive."
>
> Welton *vs.* Missouri, 91 U. S., 275-278-281.

Speaking of Welton *vs.* State of Missouri, 91 U. S., 275, Justice BREWER says:—

> "It is true that the case turned largely upon the fact of discrimination between products of other States and those of Missouri, but nevertheless the [illegible] is an adjudication that the imposition of a license tax on the peddling of goods is a regulation of commerce."
>
> 153 U. S., 304.

Under these cases, and especially under Leloup *vs.* Mobile (*infra*), which is directly in point, it is clear that the City of Philadelphia cannot impose a charge upon the Telegraph Company for the right to maintain its poles and wires therein any more than it can impose a license tax upon its occupation, or for the privilege of doing business within the limits of that city, or for the right to maintain an office therein.

Conceding the power of police regulation, and even that a tax may be imposed as part thereof, it would seem that there is a plain and important distinction and difference with reference to the subject upon which such tax can be imposed as part of said police power.

Thus, although the State of New York had authority

under the police power to require lists of immigrants to be furnished it, as decided by this Court in New York *vs.* Miln, 11 Pet., 103, yet it had no power to require a tax to be paid upon such passengers. (Passenger Cases, 7 Howard, 283.) And therefore under a statute which required a master to file such lists and comply with certain other conditions *or* pay the tax, it was held that the statute was void, although otherwise a proper exercise of the police power in respect to a matter in which the police power is specially applicable.

Henderson *vs.* Mayor, 92 U. S., 259.

So again, although cities may lawfully regulate or even prohibit traffic in or transportation of high explosives, such as nitro-glycerine, between persons within their territorial limits, yet, nevertheless, it would seem to be quite clear that it could not, under the guise of a police inspection, impose what was substantially a tax upon nitro-glycerine carried through its limits on the way, and as part of a continuous transportation, from one State to another.

And so in regard to spirituous liquors—although a State may prohibit the sale thereof, it is only after the same has become mixed with other property within its limits that such prohibition can take effect, and it is wholly without power to prohibit the transportation of liquors across its territory as part of a continuous transportation thereof from one State to another; nor could the same end be accomplished by prescribing an inspection accompanied by an inspection fee, which would practically be a tax upon the article transported.

So in reference to the matter in hand. A regulation of and incidental tax upon poles and wires for trolley lines or electric light lines, or even telephone lines are purely matters of local importance in respect to which the particular locality not only has, but ought to have, the right to prohibit and therefore a power of regulation, and any tax imposed as part of the regulation is a matter of purely

local consequence, because in the nature of things it must be paid out of the charges imposed for the use of the trolley line, or electric light line, or telephone line by the inhabitants of the locality imposing the tax—by the constituency of the body imposing the tax—and therefore in respect to such charges it may well be that the courts should hold that there is a presumption in favor of the regularity of the municipal action.

But not so in respect to telegraph poles and wires—a regulation and tax on them is not of local importance, but in its effect operates upon the whole line and upon all the business done thereon. In the present case the tax upon these poles and wires must be paid from the receipts derived from the transmission of messages in which the citizens of Philadelphia have personally little or no interest, for, of necessity, the proportion of messages sent to or from citizens of Philadelphia, is very small as compared with the proportion of messages sent from points north and east of Pennsylvania through Philadelphia to points south and west of Pennsylvania. The tax, therefore, is in its very nature not local, but national, and its propriety is not therefore to be judged from the local standpoint, as in the case of a tax on, *e. g.*, electric light poles and wires, which are matters of municipal concern only. It would therefore follow that even conceding the right of the City of Philadelphia to regulate and impose the cost of regulation upon the telegraph company, yet that it is peculiarly the province and the duty of this Court to see to it that the tax does not exceed the necessity for its imposition, and is not of such amount as to become a "needless" burden upon other communities, whose communication by electricity must pass through Philadelphia.

In the Mississippi Case the tax was only one dollar per mile of wire, which was "in lieu of other State, county, and municipal taxes" (Postal Tel. Co. *vs.* Adams, 155 U. S., 688), and it would seem that a charge which amounts to nearly four times that much, and levied as a charge for inspection alone, is manifestly exorbitant and

practically a tax, and therefore a regulation, of interstate commerce, for the transaction of which these poles and wires are necessary appliances.

It cannot be rightfully contended that in this case the Western Union Company is seeking to evade taxation. Taxation is governed by the value of the property taxed, and is uniform, bearing equally upon all property subject thereto; but in this case the charge confessedly has no relation to the value of the property or of the business done thereon, or of the earnings thereof, but is fixed at the discretion of the municipal legislature, without consideration of the rights of the general public or of the obligations of the company thereto.

The distinction sought to be made in this case is very clearly shown and seems to be sustained by the decisions of this court in respect to taxes on telegraph companies.

The property of a telegraph company is liable to taxation by a State on the same basis as all other property is so liable, a tax which the plaintiff in error has always paid to the State of Pennsylvania.

Western Union Tel. Co. *vs.* Massachusetts, 125 U. S., 530.

And even where the tax is imposed in form as a privilege tax, but is "in lieu of other State, county, and municipal taxes," and the amount of the tax is made dependent in fact upon the value of the property of the taxpayer situated within the jurisdiction of the State imposing the same it will, nevertheless, and notwithstanding its form, be held valid and sustained by this court.

Postal Tel. Co. *vs.* Adams, 155 U. S., 688.

And so a State may impose a specific tax on each telegraph message which the company sends over its line wholly within the State imposing such tax, but not upon messages sent by officers of the United States on public business, and not upon messages sent or received to or from points without the State. The power to tax such messages is confined to messages sent from one place to

another exclusively within the jurisdiction of the State imposing the tax.

Telegraph Co. *vs.* Texas, 105 U. S., 460.

And so a State may tax the gross receipts of a telegraph company derived from business transacted exclusively within the State.

Ratterman *vs.* Western Union Tel. Co., 127 U. S., 411;

Western Union Tel. Co. *vs.* Alabama, 132 U. S., 472.

Again, it has been held that a license tax imposed by a municipality duly authorized thereto by the State upon, *inter alia*, "telegraph companies or its agencies, each, for business done exclusively within the city of Charleston and not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents, $500," was valid.

Postal Tel. Co. *vs.* Charleston, 153 U. S., 692.

But there is nothing in any of these cases which holds or intimates, and, on the contrary, the reasoning of the court in all of them is wholly inconsistent with the right of a State, or of a municipality under the law of a State, to require a telegraph company to take out a license for the transaction of its business, or to impose upon it a tax for such license.

The Port of Mobile, a municipal corporation of the State of Alabama, enacted an ordinance:—

> "That the license tax for the year, from the 15th of March, 1883, to the 15th of March, 1884, be and the same is hereby fixed as follows: On telegraph companies, $225."

[It would have been no different, we submit, if the amount had been fixed by a tax or charge or imposition of so many dollars on each pole or each mile of wire.]

The action was for a penalty of five dollars, brought by the Port of Mobile against Leloup, who pleaded that he was the agent of the Western Union Telegraph Company at that place; that said company was engaged in the business of interstate commerce, and that he was in no other way engaged in the telegraph business. The Port demurred, and the local court gave judgment for the plaintiff, which was affirmed by the Supreme Court of the State, which said:—

> "That no revenue for State or municipal purposes can be derived from the agencies or instrumentalities of commerce no one will contend. The question generally mooted is, How shall this end be attained? In the light of the many adjudications on the subject the ablest jurists will admit that the line which separates the power from its abuse is sometimes very difficult to trace. No possible good could come of any attempt to collect, explain, and harmonize them. We will not attempt it. We confess ourselves unable to see a distinction between this case and the principle involved in Osborne *vs.* Mobile, 16 Wall., 479. In that case the license levied was upheld, and we think it should be in this case."

This court said of the ordinance sustained in Osborne *vs.* Mobile:—

> "This court said that the ordinance was not unconstitutional. This was in December Term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States."

And in holding the ordinance invalid this court further said:—

"Can a State prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. Ordinary occupations are taxed in various ways, and in most cases legitimately taxed, but we fail to see how the State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation—a tax on the occupation of doing a business is surely a tax on the business. Now we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different States, it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and free from the control of State regulations except such as are strictly of a police character. * * *

"In our opinion, such construction of the Constitution leads to the conclusion that no State has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such tax is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

Leloup *vs.* Port of Mobile, 127 U. S., 640-645-648.

The poles and wires taxed in this case were used, according to the testimony, "for the general business of the entire country, messages from all parts of the South, the North, the East, and West all going to Washington or New York and New Orleans, or cablegrams or Govern-

ment messages." (Record, page 36.) The plaintiff in error respectfully insists that a tax, whether imposed under the guise of a police regulation or not, imposed upon these necessary instruments for carrying on the business of interstate commerce, in the nature of postal service, is as much prohibited as a license tax upon the occupation of doing such business or upon the office or agencies for transacting the same, and should have been held unconstitutional and void by the court below.

The lines of the plaintiff in error extend into all the cities and towns of the United States and into almost all the boroughs and villages—they have been extended into any place, however small, where population has been concentrated, and the poles and wires are the necessary means for the communication of intelligence by electricity between these different points.

If the municipalities of Pennsylvania can, under their general police power, impose police taxes upon these poles and wires, notwithstanding the powers conferred by the Act of Congress, then each and every of the municipalities throughout the United States—each and every of the cities, towns, villages, boroughs, and townships throughout the whole country—may do the same.

The most general rate imposed by the municipalities of Pennsylvania, as shown by the reported cases, is one dollar per pole per annum, and two dollars and fifty cents per mile of wire per annum, which, varying with the number of wires on the pole, amounts to a tax of from $50 to $100 a year per mile of line, an amount which far exceeds in proportion to the value of the property any tax, usually so called, imposed anywhere in that State upon any kind of property whatsoever; and such a rate extended throughout the United States—and there is no possible legal reason why it should not be so extended if it is valid in the State of Pennsylvania—would, it is plain to be seen, be ruinous to telegraph companies.

A tax which confessedly is not a tax on property, or on an occupation or business, or on the receipts derived therefrom, and which is therefore subject to no rule, but is

fixed at the discretion of a municipality as tempered by that of a jury, *and which yet confessedly exceeds in amount any possible rate of legitimate taxation*, and in point of fact all other legitimate taxation combined, would seem to be so far across "the line which separates the power from its abuse" as to be in this case easy "to trace."

Telegraph companies in Pennsylvania pay not only a tax upon their capital stock, which represents the value of their property—their franchises as well as their tangible property—but they also pay another tax upon their gross receipts, which represents the earning power of that property—thus, in fact, they pay a double tax, first, upon the value of the property; and, secondly, upon the value of its use—and yet in this case a city is permitted to impose yet another tax equivalent to a tax of ninety-nine dollars and fifty cents per mile of poles and wires in Philadelphia, an amount which is plainly a very large proportion of the whole value thereof, and very much in excess of any tax which could be imposed under the taxing power.

Against these charges telegraph companies have no protection except that afforded by the prohibition implied in the commerce clause of the Constitution of the United States, a protection which can only be made effective by the action of this Court, and to extend which was one of the reasons for its creation. The plaintiff in error now confidently seeks in this case to have extended to it by this Court the protection thus conferred by that Constitution.

H. B. GILL,
SILAS W. PETTIT,
For Plaintiff in Error.

GEO. H. FEARONS,
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RUSH TAGGART,
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JOHN F. DILLON,
Of Counsel.

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No. 163.—OCTOBER TERM, 1902.

Office Supreme Court U.
FILED
MAR 2 1903
JAMES H. MCKENNEY,
Clerk

Supreme Court of the United States.

THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY,
Plaintiff in Error,

against

THE CITY OF PHILADELPHIA,
Defendant in Error.

APPENDIX

TO

BRIEF OF PLAINTIFF IN ERROR, CONTAINING FEDERAL AND STATE LEGISLATION.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

ACTS OF CONGRESS.

United States Telegraph Act of July 24, 1866.

(Stats. at Large, Vol. 14, p. 221).

" AN ACT to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, being *Title LXV.* of the U. S. Rev. Stat (p. 1019).

" Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Sec. 1. That any telegraph company now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States, provided that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters or interfere with the ordinary travel of such military or post-roads.

And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses, in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its lines of telegraph may be located, as may be

necessary for its stations, not exceeding 40 acres for each station; but such stations shall not be within 15 miles of each other.

"SEC. 2. And be it further enacted that telegraphic communications between the several departments of the Government of the United States and their officers and agents, shall, in their transmission over the lines of any of said companies, have priority over all other business and shall be sent at rates to be annually fixed by the Postmaster-General.

"SEC. 3. And be it further enacted that the rights and privileges hereby granted shall not be transferred by any company acting under this Act, to any other corporation, association or person; provided, however, that the United States may at any time after the expiration of five years from the date of the passage of this Act for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies, at an appraised value to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"SEC. 4. And it be further enacted that before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this Act."

Act of Congress of June 10, 1872, enforcing Act of July 24, 1866. Vol. 17, Stats. at Large, p. 366.

"Provided that the Secretary of War be and he hereby is authorized and required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports and signals as may be found necessary for the benefit of agricultural and commercial interests; and provided that no part of this appropriation nor of any appropriation for the several departments of the Government shall be paid to any telegraph company which shall neglect or refuse to transmit telegraphic communications between said departments, their officers, agents or employees, under the provisions of

the second section of chapter 230 of the statute of the United States for the year 1866, and at rates of compensation therefor to be established by the Postmaster-General: provided also that, whenever any telegraph company shall have filed its written acceptance with the Postmaster-General of the restrictions and obligations required by the Act approved July 24, 1866, entitled 'An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes,' if such company, its agents or employees shall hereafter refuse or neglect to transmit any such telegraphic communications as are provided for the aforesaid Act or by the joint resolution approved the 9th day of February, 1870, 'to authorize the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent and for giving notice on the northern lakes and seaboard of the approach and force of storms,' such telegraph company shall forfeit and pay to the United States not less than one hundred and not exceeding one thousand dollars for each refusal or neglect aforesaid, to be recovered by an action or actions at law in any District Court of the United States."

Acts of Congress Concerning Post Roads.

AN ACT, approved June 8th, 1872, being in Chapter Nine, United States Revised Statutes (p. 768). (Vol 17 Stats at Large p 308, 309.)

SEC. 3964 Rev Stats. The following are established post-roads:

* * * * * *

All railroads or parts of railroads which are now or hereafter may be in operation.

* * * * * *

All letter-carrier routes established in any city or town for the collection and delivery of mail matters.

CHAP. 9. AN ACT making all public roads and highways post-routes.
(Vol 23 Stats at Large p 3.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That all public roads and highways while kept up and maintained as such are hereby declared to be post-routes.

Approved, March 1st, 1884.

CONSTITUTION AND LAWS OF PENNSYLVANIA.

Constitutional Provision.

The **Constitution of Pennsylvania**, article XVI., section 12, provides:—

"Any association or corporation, organized for the purpose, or any individual, **shall have the right to construct and maintain lines of telegraph within this State**, and to connect the same with other lines, and the General Assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section."

Legislative Act of 1874.

Pursuant to this mandate the Legislature of Pennsylvania, by **Act of 29th April, 1874**, section 33, P. L., 92, provided for the incorporation of telegraph companies, and that when incorporated they should be authorized—

"To construct lines of telegraph along and upon any of the public roads, streets, lands, or highways, or across any of the waters within the limits of this State, by **the erection of the necessary fixtures**,

including posts, piers, or abutments, for sustaining the cords or wires of such lines; but the same shall not be so constructed as to incommode the public use of **said roads, streets, or highways, or injuriously interrupt the navigation of said waters."**

Legislative Act, May 1, 1876.

Before the exercise of any of the powers given under this act, application shall be first made to the municipal authorities of the city, town, or borough in which it is proposed to exercise said powers, for permission to erect poles or run wires on the same, or over or under any of the streets, lanes or alleys of said city, town or borough, which permission shall be given by ordinance only, and may impose such conditions and regulations as the municipal authorities deem necessary: *Provided*, That cities of the first class shall be exempted from the provisions of this act. This Act of 1876 was amended by the Act of June 25th 1885, P. L. 164, and this latter Act re-enacted the above cited section except the proviso.

Memorandum.

There is no legislative authority in express terms in Pennsylvania conferring upon the City of Philadelphia or any borough or municipality in the State the power either *(a)* to *tax* telegraph companies, or *(b)* to require telegraph companies to take out a *license* from any municipal authority, or *(c)* subjecting telegraph companies to the *police power* of the municipal authorities. As to the mode of taxation of corporations in Pennsylvania, including telegraph companies, see BRIEF of Telegraph Company in Case 163 pp 23, 68. The telegraph company has paid all taxes assessed upon its property (Record in Case 163 p 15).

FURTHER MEMORANDUM:

The Federal and State legislation contained in this APPENDIX is equally applicable to the petition for a rehearing in case No. 101, Western Union Telegraph Company v. Borough of New Hope, and may be considered as filed also in connection with said petition for re-hearing.

Inasmuch as the questions raised in these cases, Nos. 101 and 163, involve, inter alia, the construction of the commerce-clause of the Constitution and its application in a new and important aspect, and as neither of these cases has ever been heard before a full bench, we venture respectfully to suggest that, in accordance with a salutary practice of this Court to have such questions passed upon by a full bench, both of these cases could, with propriety, be set down for full re-argument upon the important questions involved before all the justices.

SILAS W. PETTIT,
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HENRY D. ESTABROOK,
Counsel for Telegraph Companies.

JOHN F. DILLON,
Of Counsel.

COPY.

JAN 30 1903
JAMES H. McKENNEY, Clerk.

No. 163 OCTOBER TERM, 1902.

Supreme Court of the United States

THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY

Plaintiff in Error

against

THE CITY OF PHILADELPHIA

Defendant in Error

Brief of Defendant in Error

JAMES ALCORN
Assistant City Solicitor
JOHN L. KINSEY
City Solicitor
for Defendant in Error

Supreme Court of the United States

October Term, 1902. No. 163.

THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY,

Plaintiff in Error,

AGAINST

THE CITY OF PHILADELPHIA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The contention between the parties to this appeal resolves itself into a single question, namely, whether the City of Philadelphia, a municipal corporation, can by ordinance impose on the Atlantic and Pacific Telegraphic Company a charge of $1.00 per pole per annum, and $2.50 per mile for wires per annum for the poles and overhead wires which the said telegraph company own and use, and have constructed on the public streets and highways of the said city.

The decision rendered by this Court on January 5, 1903, in Western Union Telegraph Company *vs.* Borough of New Hope, determines this question in favor of the defendant in error, and it would be probably sufficient to refer to the opinion filed in that case. The license fees charged by the Borough of New Hope were the same as those im-

posed by the defendant in error upon the plaintiff in error, and as this Court considered the charges as made by the Borough of New Hope reasonable, it would necessarily follow that the same charges imposed by the City of Philadelphia, defendant in error, were also reasonable.

The plaintiff in error admits that such a charge can be made only in the exercise of the police powers of the municipality, and that it was properly done in the exercise of those powers, but that the amount imposed is excessive and unreasonable. Admitting the right of the defendant in error to impose a license fee or charge for poles and wires as a police regulation, it is then only a question as to whether the amount of the charge imposed, namely, $1.00 for each pole and $2.50 for each mile of wire per annum is excessive and unreasonable. It is hardly necessary to discuss any questions of interstate commerce, or whether corporations engaged in interstate commerce can be subjected to State or municipal taxes.

It has been settled and quite recently in the case of City of Philadelphia *vs.* Western Union Telegraph Company, 89 Federal Reporter, 454, that

> "It is lawful for a State to impose taxes upon property owned and used within it by a corporation of another State, even when such corporation is engaged in interstate commerce, and that the exaction of a license tax is a valid exercise of power by municipal corporations, in order to cover expenses to which they may be put in the enforcement of their police rules and regulations."

This quotation is from Mr. Justice SHIRAS, who delivered the opinion of the Circuit Court of Appeals in the case above referred to, and therein makes the following citations: Telegraph Co. *vs.* Attorney General, 124 U. S., 530; License Tax Cases, 5 Wall., 462; Wiggins Ferry Co. *vs.*

City of E. St. Louis, 107 U. S., 365; Postal Telegraph Cable Co. *vs.* City of Charleston, 153 U. S., 692.

In the case of City of Philadelphia *vs.* Western Union Telegraph Co., *supra*, the said city was endeavoring to collect from the Western Union Telegraph Company similar license fees as are claimed from the plaintiff in error in this case. The same view was taken by the Circuit Court of Appeals in City of Philadelphia *vs.* Atlantic and Pacific Telegraph Company, 102 Federal Reporter, 258.

It may be proper in answer to the argument of the plaintiff in error to briefly consider the right of the municipality to tax telegraph companies, or to require them to pay rental for the use of the highways, but as it is not in the judgment of the defendant in error believed to be an important issue in this proceeding, and as the plaintiff in error admits that the charges imposed and for which the claim is made by the defendant in error can be sustained as a police regulation, we will endeavor to show that the charges are reasonable and the ordinances authorizing them are therefore valid.

As was said by Mr. Justice SHIRAS in the case of City of Philadelphia *vs.* Western Union Telegraph Company, 89 Federal Reporter, 460:

> "It has sometimes been urged that such questions are peculiarly suited for legislative determination. And it must be admitted that there is a presumption in favor of the validity of the action of the legislative body, and that the evidence to justify a court in holding otherwise must be clear and convincing. * * * Not only is there a presumption in favor of the validity of the action of the legislative body, but the facts upon which that action proceeds are so numerous, and so liable to frequent changes, courts should act cautiously in dealing with such a case, and admit evidence of all facts and circumstances that seem to bear, even somewhat remotely, upon the issue."

And citing with approval the opinion of the Supreme Court of Pennsylvania in Allentown *vs.* Telegraph Co., 148 Pa. St. Reports, page 119:

> "The amount of the license charges rests with the city councils in the first instance, and it is only where such discretion has been manifestly abused that the Courts are justified in interfering."

In referring to the language of Mr. Justice SHIRAS, above cited, the United States Court of Appeals in City of Philadelphia *vs.* Atlantic and Pacific Telegraph Co., 102 Federal Reporter, 258, says:

> "Having regard to the entire evidence, it cannot, we think, be affirmed that in the passage of the ordinance in question there was manifest abuse of legislative discretion by the city councils. The evidence here did not warrant such a finding by the jury. These views, of course, require us to say, not only that the Court should have affirmed the plaintiff's sixth point, but also the plaintiff's first and fourth points."

With practically the same evidence before them as was submitted by the plaintiff in error upon the trial of this case in the Circuit Court of the United States for the Eastern District of Pennsylvania, the United States Court of Appeals in the two cases above cited determined that the ordinances imposing the charges now claimed by the City of Philadelphia, defendant in error, against the Atlantic and Pacific Telegraph Company, plaintiff in error were valid. It would appear that these decisions of the United States Court of Appeals are sufficient authority for affirming the judgment of the Circuit Court in this case. Upon the trial of this case in the Circuit Court, the evidence submitted by both the defendant in error and plaintiff in error was iden-

tical with that submitted on the first trial, and which proceeding was reviewed by the United States Court of Appeals in 102 Federal Reporter, 258. The United States Circuit Court of Appeals sustained the first, third and fourth assignments of error filed by the City of Philadelphia.

There being then no sufficient testimony offered by the plaintiff in error upon the second trial, the learned Judge of the Circuit Court following the opinion of the United States Court of Appeals, directed a verdict for the defendant in error for the full amount of the charges. The same view has been taken by the Supreme Court of the State of Pennsylvania in several cases in which the charges imposed were similar to those claimed in this case. The plaintiff in error in its paper book refers to those cases, and they need be mentioned here only to impress upon the Court that the highest court of the State of Pennsylvania has considered these ordinances, and whether the charges imposed are reasonable or not, and have determined those charges to be reasonable, and the ordinances valid. These decisions are found in Taylor *vs.* Postal Telegraph Co., 202 Pa. St., 583; Chester *vs.* Western Union Telegraph Co., 154 Pa. St., 466; Allentown *vs.* Western Union Telegraph Co., 148 Pa. St., 117; Philadelphia *vs.* American Union Telegraph Co., 167 Pa. St., 406; Chester *vs.* Philadelphia, Reading and Pottsville Telegraph Co., 148 Pa. St., 120. The Superior Court of the State of Pennsylvania also found that charges similar to those in this case were reasonable and proper.

We have then a finding by the United States Circuit Court of Appeals and by the appellate courts of the State of Pennsylvania that the charges herein claimed were reasonable.

The Supreme Court of the State of New York in Philadelphia *vs.* Postal Telegraph Co., 67 Hun., 21, considered the same ordinances as imposed the charges in this case, and held them to be valid, and the charges reasonable.

The evidence in the court below shows clearly the reasonableness of the charges which the defendant in error is now attempting to collect from the plaintiff in error. They were imposed by the City of Philadelphia, defendant in error, by ordinances of January 6, 1881, see Record, page 26, and March 30, 1883, see Record, page 28. The first entitled "An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the City of Philadelphia." It contains a preamble as follows:

> "WHEREAS, great inconvenience and annoyance have been occasioned to property owners by the placing of telegraph poles in front of their premises:
>
> "AND, WHEREAS, the lives and property of citizens traveling upon the public streets and highways have been imperiled by the erection and maintenance of inadequate or unsound telegraph poles thereon, so that it has become necessary to establish a system for the proper inspection of such poles, and for the regulation of the erection and maintenance thereof."

It will thus appear that the purpose of the ordinance is to provide against inadequate or unsound telegraph poles and to establish a system for proper inspection so that the lives and property of citizens may not be endangered. In section two it provides for a thorough and careful inspection to be made at least once in every year, and makes it the duty of the Superintendent of the Police and Fire Alarm Telegraph to perform this work. This was clearly within the police powers of the city, defendant in error, and the charges imposed for that purpose were proper ones. That ordinance makes a charge for issuing a license for a pole of $1.00 for each and every pole per annum.

The ordinance of 1883 regulated the introduction and use of underground conduits, wires and cables for electrical conductors in the streets of the City of Philadelphia and to

provide for charges for underground, overground, or overhead wires, etc. It fixed a charge of $2.50 per mile for overhead wires for telegraphic and telephonic purposes.

It was shown that the defendant in error through its Electrical Bureau, to which were attached in 1891 a chief, a manager and assistant manager, a clerk and assistant clerk, a draftsman, six inspectors, a foreman and seven line men, made constant inspection of the poles and wires of the various telegraph and telephone companies, and that the police force of the said defendant in error were required as a part of its duty to take notice of the condition of the various poles and wires of telegraph and telephone companies. The evidence showed that the wages of these employees in the year 1891 amounted to $24,630.00. Besides this expense there was the cost of the offices occupied by the Electrical Bureau, maintenance of horses and wagons, and the expense of stables for those horses. It is true that these employees also performed work directly for the City of Philadelphia as to its poles and fire alarm telegraph, and its underground conduits and poles and wires. It was also shown that in case of fire these poles and overhead wires were a hindrance to the firemen in reaching the buildings on fire, and that there was necessarily entailed upon the city, defendant in error, an additional expense upon that account. Testimony was submitted as to the danger of overhead wires and the possibility of accidents both on account of the poles and wires. It would be difficult at any time to accurately determine how much of the expenditures in this connection related to the poles and wires of the plaintiff in error, or to the poles and wires of any telegraph or telephone company. It is not necessary to accurately fix the amount of expense to which the municipality is put because of the inspection of the poles and wires of the plaintiff in error. It is sufficient that the defendant in error shows expenses and losses approximately reaching the amount of license charges imposed.

The legislative body of the City of Philadelphia, defendant in error, having fixed the charges, it is presumed that they are reasonable, and the evidence of the defendant in error which would require a Court to declare such charges unreasonable or the legislative action invalid, must be clear and convincing. The burden is upon the plaintiff in error to show the unreasonableness of the charges. The evidence offered by the plaintiff in error in this case falls very short of proving anything in relation to the unreasonableness of the charges imposed. Whether the charges be reasonable or not cannot be determined by the amount of cost the plaintiff in error may be put to in repairing the poles and wires, nor would it be dependent upon the amount of business which the company, plaintiff in error, may do. The defendant in error, the municipal corporation, is the party to be reimbursed by the charges imposed, and when, as in this case, the express and evident purpose of the charges is to provide a system of inspection primarily to protect the property and rights of the citizens, it is the duty of the Court to sustain the legislative action. Whether the charges are reasonable or not is probably an issue of fact to be determined by a jury, and it was so determined in this case. It is the duty of the Court in trying an issue of fact before a jury, if there be not sufficient evidence to create any dispute of fact, to direct a verdict. In this case the ordinances were offered in evidence, thereby establishing a presumption of the reasonableness of the charges. The defendant in error could have rested upon the legislative action as set forth in these ordinances, but as the plaintiff in error put in some evidence for the ostensible purpose of showing the charges to be unreasonable, the defendant in error in rebuttal showed the establishment of an Electrical Bureau, the employment by the city, defendant in error, of various officials, linemen and inspectors, the constant inspection of the poles and wires, the duty of the police officers, the interference with the fire-

men, and the danger to the lives and property of the citizens by the poles and overhead wires. The plaintiff in error did not offer a scintilla of evidence which tended to rebut the presumption of the validity of the ordinances and the reasonableness of the charges. There was no issue of fact in dispute for the jury to determine. The learned Judge of the Circuit Court seeing that the defendant in error had established the validity of the ordinances and the reasonableness of the charges, and the plaintiff in error had not created a doubt as to the reasonableness of the charges, directed a verdict for the full amount of the claim of the defendant in error. Under all of the decisions nothing less could have been done.

It is not material whether the charges made be a license fee exacted under the power to regulate or the power to tax, as was said in Postal Telegraph Co. *vs.* Charleston, 153 U. S., 692, by Mr. Justice SHIRAS:

> "Whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference, if the power to do either exists."

Nor is it material whether the charges made be considered as a rental for the use of the highways. Much stress is laid by the plaintiff in error in its paper book upon the difference between the powers of the City of Philadelphia, defendant in error, and those of the City of St. Louis as appears in St. Louis *vs.* Western Union Telegraph Co., 148 U. S., 92.

The defendant in error does not admit the position of the plaintiff in error that a tax could not be levied upon a telegraph company because it is engaged in interstate business, and contents itself with referring to Postal Telegraph Co. *vs.* Charleston, 153 U. S., 692; Western Union Telegraph Co. *vs.* Mass., 125 U. S., 530, and Wiggins Ferry Co. *vs.* East St. Louis, 107 U. S., 365.

So far as concerns the right of the plaintiff in error to occupy the public streets and highways of the defendant in error, without being subject to the regulations of the municipal authorities, the defendant in error disputes that position. It is true that the Constitution of the State of Pennsylvania gives the right to any association or corporation organized for the purpose to construct and maintain lines of telegraph within the State. The authority given by the Act of Incorporation of April 29, 1874, Section 33, P. L. 92, referring as it does to companies incorporated under that Act, provides that "the same shall not be so constructed as to incommode the public use of said roads, streets or highways, or injuriously interrupt the navigation of said waters." This Act was amended by the Act of May 1, 1876, P. L. 90, and section four of the last-mentioned Act is as follows:

> "That before the exercise of any of the powers given under this act, application shall be first made to the municipal authorities of the city, town or borough in which it is proposed to exercise said powers, for permission to erect poles or run wires on the same, or over or under any of the streets, lanes or alleys of said city, town or borough, which permission shall be given by ordinance only, and may impose such conditions and regulations as the municipal authorities may deem necessary: PROVIDED, That cities of the first class shall be exempted from the provisions of this act."

The Act of 1876 was further amended by the Act of June 25, 1885, P. L. 164, and this latter amendment reenacted the above recited section, except the proviso. It will therefore appear that in pursuance of the constitutional provision, the legislature has enacted a general law which requires the consent of municipal authorities before a telegraph company can erect poles or wires upon the public streets, and authorizes the municipal authorities to impose

such conditions and regulations as they may deem necessary. Were the plaintiff in error now endeavoring to erect poles and wires in the City of Philadelphia it could not do so without the consent of the municipal authorities, and those authorities could impose upon it such conditions and regulations as they deemed necessary.

The question of the right of the municipal authorities to regulate telegraph companies was before the local courts of the County of Philadelphia in 1876. On April 3d, of that year, the Court of Common Pleas, No. 4, of the County of Philadelphia rendered a decision in City of Philadelphia *vs.* Western Union Telegraph Co., 2 W. N. C., 455. A bill in equity was filed in that case to restrain the Western Union Telegraph Company from erecting in Philadelphia telegraph poles and fixtures without authority from Councils so to do, and that they be ordered to take down those so erected in violation of law. This application for an injunction was based upon the ordinance of City of Philadelphia of April 18, 1863, which made it unlawful for any telegraph company to erect any pole or poles in any of the streets, lanes or alleys of the City of Philadelphia, or to change the route of any telegraph line now erected, unless authorized by Councils. An injunction was issued as prayed for. It was therein clearly held that all legislative grants of power to private corporations to carry on business in the City of Philadelphia are made upon the implied condition that they shall be subject to such reasonable regulations as the city shall think necessary to enact in pursuance of its chartered powers for the protection of its citizens; and in case of any conflict arising between the city and such private corporations these regulations are to be construed liberally, and in favor of the city, and in furtherance of the rights of the public. It was held that the ordinance of 1863 was a lawful and reasonable police regulation necessary for the protection of public interests, and was binding upon the

telegraph companies empowered by legislation to run their lines through the city. In referring to the Act of Congress of 1866, Judge THAYER said:

> "But the defendants prefer still another claim which is asserted to be paramount alike to the city laws and the laws of Pennsylvania, and to override them all. They claim that under the Act of Congress of July 24, 1866, they are entitled to build lines of telegraph over any of the post roads of the United States. They assert that all the streets of this city are post roads of the United States, and so they are (Revised Statutes of the United States, page 773), and that they have therefore the right to use any or all of them for their lines. The act referred to (Revised Statutes of United States, page 1024) enacts that 'any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States.'" * * * "The Act is operative doubtless over the public domain of the United States, and over such military or post roads as belong to the United States, or are under their exclusive control. But an attempt to extend it over the roads which are the property of the several States, and as to which the right of the soil is in general in private persons, upon the ground that these also are post roads of the United States, would, in my judgment, be an unconstitutional exercise of power. Such roads are not the property of the United States, and they have no rights in them other than a right of transit over them for postal pur-

poses. Such roads may at any time be vacated by the several States, or wholly diverted and changed in their course. While they exist and are declared post roads by Acts of Congress, the United States have the right to transport the mail along them, but this is the limit and extent of their authority over them. Congress could as readily pass a law giving to any railroad company organized under the laws of any State the right to construct a railroad over all the roads of the several States which are post roads, as they could give the defendants the powers which they claim under this Act—a proposition which I apprehend few would be bold enough to maintain."

This view of the Act of 1866 was endorsed by this Court in St. Louis *vs.* Western Union Telegraph Co., 148 U. S., 92. It was therein said:

"It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. * * * It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the State House grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the State House grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the National Government to dispossess the State of such control and use, or appropriate the same to its own benefit or the benefit of any of its corpora-

> tions or grantees without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for purposes of travel and common use they are open to the citizens of every State alike, and no State can, by its legislation, deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or corporation of the National Government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation."

It being admitted that the defendant in error, as a police regulation, had authority to impose a license fee upon the poles and wires of the plaintiff in error, and as it is conceded that the charges claimed in this case were levied in the exercise of the police powers of the municipality, and there being no evidence that the fees so exacted were unreasonable, but on the contrary, ample evidence that the charges made were reasonable, and as the reasonableness of the ordinance imposing the charges had been determined by the courts of common pleas of several counties of the State of Pennsylvania, and by the Superior and Supreme Courts of that State, and under evidence similar to that offered in this case by the United States Court of Appeals, and recently by this Court in the case of Western Union Telegraph Co. *vs.* Borough of New Hope, it is submitted that the judgment of the Circuit Court of Appeals should be affirmed.

JAMES ALCORN,
Assistant City Solicitor.
JOHN L. KINSEY,
City Solicitor,
for Defendant in Error.

19345

IN THE

Supreme Court of the United States.

October Term, 1902. No. 163.

THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY,

Plaintiff in Error,

AGAINST

THE CITY OF PHILADELPHIA,

Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

Argument.

When preparing its brief of argument in this case the defendant in error had before it the galley proof of the brief of plaintiff in error. The argument, as then presented by the plaintiff in error, began as follows:

> "It is to be noted that this case differs from that of the Western Union Telegraph Company, plaintiff in error, against the Borough of New Hope (October Term, 1902, No. 101) argued last December, in this, that while in this case there is evidence that the municipality exercised certain reasonable police supervision and regulation over the first construction and subsequent maintenance of telegraph poles and wires, and from said evidence,

although contradicted in part at least, it may be inferred that the municipality was put to and did actually incur some expense in such police supervision and regulation which it might lawfully demand that the telegraph company should reimburse to it, yet, in the New Hope case the affirmative and uncontradicted evidence was that no such regulation and supervision had, in fact, been exercised and no such expense had, in fact, been incurred.

"In other words, while in the New Hope case it was contended by the Telegraph Company that no ground for the imposition of a tax as incident to a police regulation had been shown, it is conceded that in this case there is evidence from which it can be inferred that some tax as incident to a police regulation can be imposed. The main contention in the case under argument is that this evidence is entirely too vague and indefinite to sustain the charge sought to be recovered, and that the affirmative evidence produced by the plaintiff in error shows that it was excessive."

In the brief as filed the plaintiff in error omitted the above statements, and substituted therefor the following:

"It is to be noted that this case differs from that of the Western Union Telegraph Company, plaintiff in error, against the Borough of New Hope (October Term, 1902, No. 101), argued before this Court in December last and recently decided in this, that in that case the Court left it to the jury to find whether the license fee exceeded what was reasonable under the circumstances, while in this case the Court itself passed upon the question and gave a binding instruction to the jury to find for the plaintiff for the whole amount of both taxes, *i. e.*, the pole tax imposed by ordinance of 1881 and the wire tax imposed by ordinance of 1883."

"The contention in this case is that the City of Philadelphia had no power to impose either of the taxes in question, and that even if the city has the power to impose any charge as incident to a police regulation, the tax on the wires imposed by ordinance of 1885 was not imposed as part of such police regulation and is not justified under the police power; and that in respect to the

ordinance of 1881, the evidence showed that the amount thereof was excessive, and therefore that the Court below erred in instructing the jury to find for the plaintiff for the full amount sued for."

It will thus be seen that the plaintiff in error while originally conceding the right of the defendant in error in the exercise of the police powers to impose license fees, appears now to deny to the defendant in error that right, and also to contend that the license fees charged by the Ordinances of 1881 and 1883 were not imposed as a police measure. The defendant in error has learned that it is the intention of the Western Union Telegraph Company to ask for a re-argument of the case of the Western Union Telegraph Company against the Borough of New Hope, decided by this Court on January 5, 1903, and thus, if possible, to re-open the question of the power of a municipality to impose such charges, and of their reasonableness.

The defendant in error considers that the question of its right to impose the license fees claimed in this case, and of the reasonableness of the charges, has been settled by judicial determinations in the State of Pennsylvania and elsewhere, and by the authority of cases in the various United States courts.

In view of the desire of the plaintiff in error to re-open the questions, the defendant in error submits for the consideration of the Court the following principles:

I. The defendant in error, a municipal corporation, has the right in the exercise of its police power to impose upon the plaintiff in error license fees for the poles and wires erected on and run along the public highways.

II. That the license fees charged by the Ordinances of 1881 and 1883 by the defendant in error on the plaintiff in error were imposed as police regulations

III. That the license fees so charged were reasonable and the ordinances imposing them were valid.

IV. That the reasonableness of the charges was a question to be determined by the Court and not by the jury.

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1. The defendant in error, a municipal corporation, has the right in the exercise of its police power to impose upon the plaintiff in error license fees for the poles and wires erected on and run along the public highways.

It is difficult to define exactly what are police powers. In American and English Encyclopædia of Law, Vol. 22, New Edition, page 916, it is said:

> "That the police power in its broadest acceptation means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest."

The danger to the public and to the property of the citizens by the erection of poles on the public highway and the running of numerous wires from one pole to another is so evident that their regulation, construction and inspection would come within any possible definition of police power. The regulation of poles and wires has frequently been cited in text books as included within the objects calling for the exercise of the police power. (See American and English Encyclopædia of Law, Vol. 22, New Edition, page 918.)

In City of Philadelphia *vs.* Western Union Telegraph Company, 89 Federal Reporter, 454, Mr. Justice SHIRAS says:

> "That the exaction of a license tax is a valid exercise of power by municipal corporations, in order to cover expenses to which they may be put in the enforcement of their police rules and regulations."

and this was in reference to similar charges as claimed in this case against the Western Union Telegraph Company.

The right of the defendant in error under its police powers to impose such charges is unwillingly conceded by the plaintiff in error and is supported in Pennsylvania in the following cases:

Western Union Tel. Co. *vs.* City of Philadelphia, 22 W. N. C., 39;
Mutual Union Tel. Co. *vs.* City of Phila., 22 W. N. C., 39;
Allentown *vs.* Western Union Tel. Co., 148 Pa., 117;
Chester *vs.* Phila., Reading & Pottsville Tel. Co., 148 Pa., 120;
Chester *vs.* Western Union Tel., 154 Pa., 466;
Philadelphia *vs.* American Union Tel. Co. 167 Pa., 406;
Borough of N. Braddock *vs.* N. Central District & Printing Co., 11 Superior Court, 24;
New Hope Borough *vs.* Telegraph Co., 16 Superior Ct., 306;
Taylor Borough *vs.* Postal Tel. Co., 16 Superior Ct., 344;
Taylor Borough *vs.* Postal Tel. Co., 202 Pa., 583.

In Western Union Telegraph Co. *vs.* City of Philadelphia, 22 W. N. C., 39, the Referee determined that,

> "The City of Philadelphia has a perfect right, as a matter of police regulation, to supervise and control the erection of poles upon and the stretching of wires along its streets."

and he therein further observes:

> "To say that a corporation or an individual which has the right, either as a chartered body or as a natural

person, to erect poles on the public highways, can do so without any restraint whatever, and without any liability to have the exercise of that right regulated with reference to the rights of other persons exercised upon the same highways, or, to the rights of the municipality, appears to me to be the assertion of a proposition which would practically take the control of the streets out of the hands of the city and place it in the hands of individuals or corporations."

In that same case President Judge HARE, of Court of Common Pleas No. 2, of Philadelphia County, says :

"The streets are already lined with masts sustaining an intricate web of wires, actually or potentially charged with an electric current which is dangerous unless approached with caution, and no argument is requisite to show the inconvenience that might result if the number could be indefinitely increased. They are used not merely for telegraphy, but for telephones, and for the transmission of electricity as a source of motive power and illumination ; and much as they have multiplied in the past, we may believe that in the near future they will be still more numerous. If a fire occurs, the wires impede the erection of ladders and must be cut with proper implements before the firemen can ascend to the roofs. That some regulating hand should be applied under these circumstances for the protection of the public is apparent ; and it is not less necessary, for the sake of the various companies, which acting in a limited area and by analogous means might otherwise be brought into conflict." * * *

"The founder of our city was a man of liberal views, whose ideas were on many points in advance of his age, and if the plan of Philadelphia, as devised by him, be compared with that of any other city then existing on the globe, we may admire his forethought in providing for the space and air which were wanting in European capitals ; but he could not reasonably anticipate that the population of an obscure provincial town, would, in the course of two centuries, grow to nearly a million of souls, with a prospect of a still larger increase in the next hun-

dred years. Still less could he have foreseen that in addition to the sewers, the water-pipes, and the lamp-posts, which he presumably contemplated, although the two former were as yet practically unknown in England, gas would be introduced as a means of light, of heat and of power; that electricity would be discovered and applied for the attainment of the same ends; that companies would be legislatively authorized to use the highways as channels for the transmission of steam; or that railways would intersect the streets, or be carried along on structures overlooking the houses, and leaving scant room for the passage of ordinary vehicles." * * *

"We have here a spectacle that almost bewilders the imagination. In addition to sewers, the water and gas pipes, with which the soil of our highways is already tunneled for municipal purposes, with a consequent liability to be torn up whenever a sewer bursts or a main is in need of repairs, any company authorized as above to supply light, heat or power, may burrow side by side with the municipality at the risk of bringing steam, water, gas and electricity into such close conjunction as will give rise to explosions like those recently witnessed in London and Philadelphia. Nor is this all; if we look above ground we may find reason to apprehend that the occupation of streets by structures erected for purposes which, though benefical, are foreign to the original design, may, if these are unduly multiplied, lead to injurious consequences. Had Penn anticipated such a result he no doubt would have made all the principal streets as wide as Arch or Market streets, but unfortunately many of our thoroughfares are too narrow for the tide of traffic and the municipal uses to which they are necessarily put, and certainly do not afford room for the multifarious works that may be superadded whenever any five men think fit to claim the privilege.

"Every one who considers the circumstances which I have inadequately portrayed, and the complications to which they may give rise, will, I think, agree that the city should have some supervision and control in a matter which deeply concerns her citizens, and the need

will be distinctly apparent if we reflect that she is responsible for the condition of the highways, and may be made answerable in damages for a want of care in guarding against the accidents that are only too likely to occur. Should a sewer burst, or a gas main explode and injure persons or property; or were one of the numerous telegraph poles to be blown down by a gale of wind with a like result, the city would be the first mark in a suit for compensation. It is, therefore, her right and duty in the interests of humanity, and that her financial burdens may not be unduly increased, to keep a watchful eye on acts which, although done by persons claiming under a higher source, are yet so interwoven with mat ters in which she is directly concerned that it is difficult to draw the line and say where her responsibility ends.

"We are, therefore, unable to agree with the referee that a license fee of $1. is so clearly excessive as to justify the Court in treating it as invalid. The question is not, in our opinion, merely what it will cost the city to take care that the telegraph poles are sound and in good order, that the wires are properly hung, and do not by 'fouling' the city wires hinder the transmission of police messages and fire alarms. It is an established principle that remuneration should be in proportion not only to time and outlay, but to responsibility, and a public or private agent who is exposed to loss may demand higher pay."

It would seem unnecessary to refer to the many authorities which determine that the regulation of poles and wires of telegraph companies is within the police powers. The Courts of Common Pleas and the Superior Court and Supreme Court of the State of Pennsylvania have adjudicated the right of the defendant in error to exercise police powers by regulating the erection of poles and wires on the public highways, and this law as announced by the courts of Pennsylvania will control all other courts where the question of the power of the defendant in error arises.

The right of the defendant in error to exercise this power and to impose license charges is recognized in Dillon

on Municipal Coporations, 4th edition, volume 2, page 830. That learned author considers that the abutting owner is entitled to compensation from the telegraph company; and on page 831, in referring to the use of the highways by telegraph companies, he says:

> "On the whole, the safer and perhaps sounder view is that such a use of the street or highway, attended as it may be especially in cities with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof."

2. That the license fees charged by the Ordinances of 1881 and 1883 by the defendant in error on the plaintiff in error were imposed as police regulations.

The defendant in error while not conceding that it is without power to levy a tax upon the plaintiff in error, or charge a rental for the use of the highways, contends that the Ordinances of 1881 and 1883 do not either levy a tax or rental, but are police regulations.

In Western Union Telegraph Company *vs.* City of Philadelphia, 22 W. N. C., 39, the same ordinances were before the Court, and the same charges imposed as in this case. These ordinances were held to be valid as police regulations and the charges imposed to be reasonable and in the exercise of police power. So in Philadelphia *vs.* American Union Telegraph Co., 167 Pa., 406.

In Allentown *vs.* Telegraph Co., 148 Pa., 117, and Chester *vs.* Telegraph Co., 148 Pa., 120, the charge per pole was the same as in this case, namely, $1 per annum. So in Chester City *vs.* Telegraph Co., 154 Pa., 464, the charge per pole was $1 per annum. In Taylor Borough *vs.* Postal Telegraph Co., 202 Pa., 583, the charge per pole was $1 per

annum, and for wires $2.50 per mile per annum, the same as in this case. In Western Union Telegraph Company *vs.* Borough of New Hope, decided by this Court on January 5, 1903, the charges were the same as in this case, namely, $1 per pole per annum, and $2.50 per mile of wire per annum.

The plaintiff in error quotes at considerable length from St. Louis *vs.* Western Union Telegraph Co., 39 Federal Reporter, 59; St. Louis *vs.* Western Union Telegraph Company, 148 U. S., 92; St. Louis *vs.* Western Union Telegraph Company, 149 U. S., 465, and St. Louis *vs.* Western Union Telegraph Co., 63 Federal Reporter, 68.

There is a very clear distinction between those cases and the one now before the Court. As was said by this Court in St. Louis *vs.* Western Union Telegraph Co., 148 U. S., 92, the charge made by the City of St. Louis of $5 per pole per annum, was a rental for the use of the highways and not a license fee exacted as a police regulation. It will be remembered that in that case the lower Court held that even as a rental the charge of $5 per pole per annum was excessive and unreasonable.

A rental differs materially from a license fee imposed under police powers. In the case of a rental the contractual relation exists, and one party cannot arbitrarily fix the amount to be charged. It must be agreed upon, or as in the case of water rent, the Court will inquire into the reasonableness of the charge, and require the party levying it to show that it is reasonable.

In the case of St. Louis *vs.* Western Union Tel. Co., 148 U. S., 92, in referring to the peculiar character of a rental, this Court said:

> "Indeed, it may be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; that the occupation by this Interstate Commerce Company of the streets cannot be denied by the city; that all it can insist upon is, in this respect, reasonable compensation for the space in the

streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is a reasonable rental. The inquiry must be open in the Courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."

The ordinances by which the defendant in error imposes the charges herein claimed show that it was in the exercise of the police powers, and not as a rental for the use of the highways. The ordinance of January 6, 1881, (see Record, page 26) is entitled "An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the City of Philadelphia." The preamble indicates that the ordinance was ordained for the purpose of protecting the public from injury likely to occur from inadequate or unsound telegraph poles. So the ordinance of March 30, 1883, (see Record, page 28). These ordinances provided for the inspection of poles and wires and made it the duty of one of the bureaus of the city to look after the construction of the poles and wires of the telegraph and telephone companies.

A license fee under police regulations is distinct from a tax. In American and English Encyclopedia of Law, Volume 22, New Edition, page 917, this distinction is thus referred to:

> "The police power must also be distinguished from the taxing power, and the distinction is this: that the taxing power is exercised for the raising of revenue and is subject to certain limitations, which will be treated elsewhere, while the police power is exercised only for the purpose of promoting the public welfare, and though this end may be attained by taxing or licensing occupations, yet the object must always be regulation and not the raising of revenue, and hence the restrictions upon the taxing power do not apply."

That the license fee is paid into the treasury and incidentally results in revenue, does not make it a tax, and if it be exacted for the purpose of regulation, it comes within the police powers.

3. That the license fees so charged were reasonable, and the ordinances imposing them were valid.

Charges similar to those claimed in this case have been sustained by the various courts of Pennsylvania and by the courts of New York.

It is required of the plaintiff in error when it alleges that the charges were unreasonable, to assume the burden of showing it. That it was unable to do so, of itself proves the reasonableness of the charge. The action of the legislative body is presumed to be proper, and a court would not hold otherwise unless in a very clear case. Indeed, it would appear that the unreasonableness of the charges should be so clear that no proof should be needed:

In Van Baalen *vs.* People, 40 Michigan (S. C., 1879), GRAVES, *J.*, says:

> "The Recorder found the facts, and among others, that the business of pawn broking gives rise to a heavy city expense, and especially in the increase of police duty and supervision which it necessitates, and he ascertained and found in terms that the sum charged does not greatly exceed the incidental and consequential expense, and it appears plainly enough from his explanations and from matters subject to judicial notice, that it is quite impossible to say the city can derive a particle of profit from the rate objected to.
>
> "Of course, the subject will not admit of nice calculation, and it would be futile to require anything of the kind. Where the power to license is not evidently abused and made a pretext for doing what is a violation of constitutional right, the courts ought not to interfere with municipal discretion."

4. That the reasonableness of the charges was a question to be determined by the Court and not by the jury.

This is submitted as it is believed to be the law, and not because the defendant in error needs to invoke this principle

in order to sustain the judgment of the Court below. As has been previously stated, the learned Judge of the United States Circuit Court submitted the question to the jury in the only way under the evidence it could be left to it. The plaintiff in error having failed to produce the slightest evidence tending to show the charges unreasonable, and there being no question in dispute, the Court told the jury that the defendant in error had made out its case, and a verdict should be rendered for the full amount of the claim.

It is suggested, however, that under the authorities the Court could have taken the case away from the jury and determined it as a question of law.

In City of Philadelphia *vs.* Western Union Tel. Co., 89 Federal Reporter, 454, counsel for both plaintiff and defendant when that case was heard in the U. S. Circuit Court admitted that it was a question of law for the Court, and not a question of fact for the jury.

In Commonwealth *vs.* Worcester, 3 Pickering (Mass.), 462, the Court said:

> "So the evidence adduced to prove the by-law unreasonable was clearly inadmissible. It was for the Court to decide whether 'the by-law was reasonable or not; and evidence to the jury on this point was irrelevant.'"

Judge DILLON in his work on Municipal Corporations, 4th Edition, Volume 1, page 404, sums up the authorities when he says:

> "Whether an ordinance be reasonable and consistent with the law or not is a question for the Court, and not the jury, and evidence to the latter on this subject is inadmissible."

In support of this he cites many cases in the notes, and when referring to Clason *vs.* Milwaukee, 30 Wis., 316, in which the opposite view was adopted, he says:

> "But the argument of the counsel for the city, that this view makes the same by-law 'valid in one case and

invalid in another, according to the varying weight of testimony and the varying views of juries,' seems unanswerable, and the text states probably the true doctrine."

This would appear to be a reasonable and proper construction, as otherwise the plaintiff in error in this case might one year be subjected to the full charges made by the Ordinances of 1881 and 1883, and in another year a different charge, according to the whim, caprice or feeling of a jury. To leave it to a jury to determine as a question of fact would be substituting the jury for the legislative body elected by the people to determine such matters. The Court would have the right to interfere so as to prevent injustice, but it ought only to be in a clear case and when it is apparently unreasonable.

The Western Union Telegraph Company in its petition and argument for a re-hearing of the case decided by this Court on January 5, 1903 (Western Union Tel. Co. *vs.* Borough of New Hope), gives an illustration of the uncertainties arising from submitting the question to a jury. Its fourth reason why a re-hearing should be allowed is as follows:

"The Court, in referring to the case in 202 Pennsylvania, 532, erred in inferring that the case there considered was similar to the case at bar, inasmuch as the reasonableness of the ordinance was submitted to a jury in Borough of New Hope *vs.* Postal Telegraph Cable Company (202 Pa., 532), which jury returned a verdict in favor of the borough for less than the amount called for by the ordinance.

"That a comparison of that case with the record in this will show that both cases were tried on the same day, before the same Court and the same panel of jurors, and for a similar cause of action; and that while in this case the ordinance of the borough was enforced, in the Postal Case there was a substitution of the discretion of the jury for that of the Burgesses."

And the petitioner then adds:

"And plaintiff in error insists that an ordinance levying any sort of tax, which on its face or by judicial

> construction, is thus made to operate partially and unequally, as different juries may differently determine, is unreasonable and void."

This conclusion is incorrect, and it should have been that it is wrong to submit the question to a jury to determine, and the reasonableness of the ordinance should have been determined by the Court.

In the case referred to, Borough of New Hope *vs.* Western Union Telegraph Co., 16 Superior Court, 306, the learned Court said:

> "The facts being undisputed, we take it that the question of the validity of the ordinance was for the Court to decide. But, if on the undisputed facts, the Court would not have been warranted in declaring the ordinance void, the submission of the question of the reasonableness of the fee to the jury was an error of which the defendant has no just cause to complain."

If the reasonableness of the ordinance is determined by the Court, then it becomes *res adjudicata*, but if it be a question to be submitted to the jury, the verdict would only be conclusive between the same parties for the same charges, and every time the defendant in error made claim for the license fees, for other years or from other companies, a jury trial would result if the telegraph company opposed the suit.

JAMES ALCORN,
Assistant City Solicitor,

JOHN L. KINSEY,
City Solictor,
for Defendant in Error.

Supreme Court of the United States.

No. 163.—October Term, 1902.

The Atlantic and Pacific Telegraph Company, Plaintiff in Error, *vs.* The City of Philadelphia. } In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

[June 1, 1903.]

This action was commenced in the Common Pleas Court of Philadelphia on December 31, 1891, to recover the sum of $3,715 as license fees alleged to be due the city for the six preceding years. The case was removed by the defendant to the Circuit Court of the United States for the Eastern District of Pennsylvania. A trial was had before the court and a jury, which resulted in a verdict and judgment for the plaintiff for a part of the sum claimed, which judgment was thereafter reversed by the Circuit Court of Appeals. A second trial was had in April, 1901, before the court and a jury, which resulted in a verdict and judgment for the full amount claimed with interest. From such judgment the case was brought to this court directly on writ of error, on the ground that it involved the construction and application of the Constitution of the United States; that the action was brought to recover from the telegraph company certain license charges imposed by the city which the company claimed the city had no right or power to impose, for the reason that it was a regulation of commerce between the States.

Mr. Justice Brewer delivered the opinion of the Court.

The question presented is as to the validity of the charges imposed by the ordinances of the city of Philadelphia upon the defendant (plaintiff in error), a corporation engaged in interstate commerce. Few questions are more important or have been more embarrassing than those arising from the efforts of a State or its municipalities to increase their revenues by exactions from corporations engaged in carrying on interstate commerce. There have been many cases, in whose decision some propositions have been adjudicated so often as to be no longer open to discussion.

First. As said by Mr. Justice Bradley, speaking for the court, in *Robbins* v. *Shelby Taxing District*, (120 U. S. 489, 492:)

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation."

In addition to the many cases referred to by him the following subsequent decisions may also be cited: *Fargo* v. *Michigan*, 121 U. S. 230, 246; *Philadelphia Steamship Company* v. *Pennsylvania*, 122 U. S. 326, 336, 346; *Western Union Telegraph Company*, v. *Pendleton*, 122 U. S. 347, 357; *Bowman* v. *Chicago &c. Railway Company*, 125 U. S. 465, 497; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648; *Asher* v. *Texas*, 128 U. S. 129, 131; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 148; *Leisy* v. *Hardin*, 135 U. S. 100, 110; *Lyng* v. *Michigan*, 135 U. S. 161; *McCall* v. *California*, 136 U. S. 104, 109; *In re Rahrer*, 140 U. S. 545, 555; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Brennan* v. *Titusville*, 153 U. S. 289, 304; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 471; *United States* v. *Knight Co.*, 156 U. S. 1, 21; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Addyston Pipe & Steel Co.* v. *United State*, 175 U. S. 211; *Stockard* v. *Morgan*, 185 U. S. 27.

Second. No State can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce. (*Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 211; *Pickard* v. *Pullman Car Co.*, 117 U. S. 34; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Fargo* v. *Michigan*, 121 U. S. 230, 245; *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 336; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 645; *Asher* v. *Texas*, 128 U. S. 129; *Lyng* v. *Michigan*, 135 U. S. 161, 166; *McCall* v. *California*, 136 U. S. 104, 115; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 220.)

Third. This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce. (*State Tax on Railway Gross Receipts* 15 Wall. 284, 293; *The Delaware Railroad Tax*, 18 Wall. 206, 232; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 211; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117, 123; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 649; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Massachusetts* v. *Western Union Tel. Co.*, 141 U. S. 40; *Pittsburg &c. Railway Co.*, v. *Backus*, 154 U. S. 421; *Western Union Tel. Co.* v. *Taggart*, 163 U. S. 1; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 220.)

Fourth. The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to State taxation, providing at least the franchise is not derived from the United States. (*Delaware Railroad Tax*, 18 Wall. 206, 232; *Postal Tel. Cable Company* v. *Adams*, 155 U. S. 688, 696; *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431, 437; *Central Pacific Railroad* v. *California*, 162 U. S. 91; *Western Union Telegraph Company* v. *Taggart*, 163 U. S. 1, 18; *Western Union Telegraph Co.* v. *Missouri ex rel. Gottleib, ante,* .)

Fifth. No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor. (*Packet Company* v. *St. Louis*, 100 U. S. 423; *Packet Company* v. *Catlettsburg*, 105 U. S. 559; *Transportation Company* v. *Parkersburg*, 107 U. S. 691; *Huse* v. *Glover*, 119 U. S. 543; *Ouachita Packet Company* v. *Aiken*, 121 U. S. 444; *St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92; *St. Louis* v. *Western Union Telegraph Company*, 149 U. S. 465; *Postal Tel. Cable Company* v. *Baltimore*, 156 U. S. 210; *Richmond* v. *Southern Bell Telephone Company*, 174 U. S. 761, 771.)

The tax sought to be collected in this case was not a tax upon the property or franchises of the company, nor in the nature of rental for occupying certain portions of the street. Neither was it a charge for the privilege of engaging in the business of interstate commerce, but it was one for the enforcement of local governmental supervision, such as was presented in *Western Union Telegraph Company* v. *New Hope*, (187 U. S. 419,) where we said (p. 427):

"This license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and as such not in itself obnoxious to the clause of the Constitution relied on."

Following that decision, we hold that the city of Philadelphia had power to pass such an ordinance as this, requiring the company to pay a reasonable license fee for the enforcement of local governmental supervision. In other words, if a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision.

But it does not follow from this that a municipality is not subject to any restraint in the amount of the charge which it so exacts. True it is often said that a license tax is in its nature arbitrary; that it is not necessarily graduated by the value of the property invested in the business licensed or its profitableness. But such observations are pertinent only in case the license is resorted to for the purposes of revenue. When it is authorized only in support of police supervision the expense of such supervision determines the amount of the charge, and if it were possible to prove in advance the exact cost that would be the limit of the tax. In the nature of things that, however, is ordinarily impossible, and so the municipality is at liberty to make the charge large enough to cover any reasonable anticipated expenses. It is authorized to fix such charge in advance, and need not wait until the end of the period for which the license is granted. It

may not act arbitrarily or unreasonably, but the risk may rightfully be cast upon the licensee, and the charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual expense of the supervision, nor can the licensee then recover the difference between the amount of the license and such cost.

Now, the license in question is, as stated, confessedly not for the purpose of raising revenue. Indeed, if it were, as it appears by the affidavit of defense that the company had paid all taxes charged upon its property as property, it might be obnoxious to a complaint of double taxation. It is not like the tax in *Postal Cable Telegraph Company* v. *Adams*, (155 U. S. 688,) which, although called a privilege tax, was in fact a property tax, and the only property tax upon the company, in respect to which we said (p. 696):

"Doubtless no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

We pass, therefore, to consider the question of the reasonableness of this license charge. *Prima facie*, it was reasonable. (*Western Union Telegraph Company* v. *New Hope*, *supra*.) It devolved upon the company to show that it was not. The case, as we have seen, was tried before the court and a jury. Upon the testimony the court instructed the jury to find for the plaintiff the full amount claimed. In support of this action it is contended that the question of reasonableness was one to be determined by the court and not by the jury, and further that there was no testimony from which either a court or jury could find that the charge was unreasonable.

It may be conceded that, generally speaking, whether an ordinance be reasonable, is a question for the court. As said by Judge Dillon, in his work on Municipal Corporations (4th ed. vol. 1, sec. 327): "Whether an ordinance be reasonable and consistent with the law or not *is a question for the court*, and not the jury, and evidence to the latter on this subject is inadmissible." While that may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed and in respect to which there is contradictory testimony. As said

by Mr. Justice Shiras, when presiding in the Court of Appeals in the Third Circuit, in a similar case (*City of Philadelphia* v. *Western Union Telegraph Company*, 89 Fed. Rep. 454, 461):

"When it is said, in some of the cases, that such a question is for the determination of the court, it is not meant that the question may not properly be submitted to a jury. What is meant by such observations is that courts are not precluded from considering the reasonableness of the legislative act prescribing the terms and amount of the charges. . . . Regarding, then, the issue to be tried as one of fact, we think it is one which, from its nature, is eminently fit for the determination of a jury. The expenses attending direct regulation and oversight are not only to be considered, but also the incidental cost to which the municipality is subjected in providing for and maintaining a proper system of supervision. We cannot undertake to specify all the particulars which should be brought into view where the reasonableness of a municipal ordinance is challenged in a court; but we think that the rule laid down in Cooley Const. Lim. (ed. 1886) p. 242, may be safely adopted: 'A municipal corporation may impose under the police power such a charge for the license as will cover the necessary expenses of issuing it, and the additional labor of officers and other expenses thereby incurred.'"

It is urged by the city that inasmuch as the license fees here charged are the same as those charged by the borough of New Hope, the validity of which was sustained in *Western Union Telegraph Company* v. *New Hope*, *supra*, it necessarily follows that the charges here imposed are reasonable. But this is a mistake. What is reasonable in one municipality may be oppressive and unreasonable in another. "In determining this question the court will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country." (1 Dillon's Municipal Corporations (4th ed.) sec. 327.)

The reasonableness of this license charge being tried before a jury, the parties were entitled to a finding of the jury upon that question of fact, unless the testimony was such as to compel a decision one way or the other, in which case the court might be justified in directing a verdict. After a careful review of the evidence we are constrained to believe that it was not such as to exclude any other conclusion than that directed by the court. We do not hold that it was not sufficient to sustain a finding by the jury to that effect, but simply that there were matters presented from which a jury might rightfully conclude that the ordinance and license charges were unreasonable. Without noticing all the evidence, we content ourselves with these matters. On January 6, 1881, an ordinance was passed by the city councils imposing a license fee of one dollar for each and every telegraph pole erected or maintained in the city. Another

ordinance of date March 30, 1883, regulating underground conduits, wires and cables, and providing for license charges for underground and overhead wires, imposed an annual license charge of two dollars and fifty cents per mile of wire for overhead telegraph wires, and one dollar per mile for underground wires. Upon these ordinances the claim was made against the company. On August 5, 1886, a further ordinance was passed, removing all charges upon underground wires. The chief of the electrical bureau of the city, without objection, testified that the removal of all charges on underground wires in 1886 was "as an inducement to have the wires placed underground, and the only requirement was that whoever did it should supply the city or furnish the city with one duct or chamber for the use of the city. There was no other charge connected with it. It was to remove all license charges, to have them place their wires underground." There was evidence of the expenses of the electrical bureau for the years in question, and that such electrical bureau supervised all electrical work upon the streets, but there was no testimony definitely disclosing how much of the labor of that bureau was in respect to telegraph wires and poles, and how much in respect to electric light wires and poles, although there was evidence of the general manner in which the electrical bureau conducted its work of supervision and the matters which came within the scope of its attention. On the other hand, the company showed the extent of its own supervision and the cost of repair, maintenance and supervision, which for the years from 1885 to 1891, inclusive, amounted to only $1.60\frac{3}{4}$ per mile. There was also proof of the number of electric light lamps, poles and miles of wire within the city, and other kindred facts.

Now the comparison of all this evidence, the determination of its weight and effect, and whether the charge made by the city for supervision was reasonable or not, should have been left to the jury. As there was testimony that the actual cost of maintenance, repair and supervision by the company was during the years in question less than one-half that charged by the city for supervision alone, and as it appeared that at first the license fee per mile of overhead wire was two dollars and fifty cents, and of underground wire one dollar, and that within three years thereafter all charges in respect to underground wire were taken away, and, as the head of the electrical department declared, so taken away for the purpose of inducing the removal of overhead wires and placing them all underground, a jury might have found that the ordinance was unreasonable. It might have come to the conclusion that the charge was not made simply to meet the expenses of supervision, but rather to make a charge so burdensome as to compel the company to remove its wires from poles and put them in conduits. We do not say that a city has not, by virtue of its police powers, authority directly to compel the removal of wires from poles to conduits, but it may be questionable whether a city can seek the same results by an

excessive and unreasonable charge upon overhead wires. We think, therefore, the court erred in withdrawing the case from the jury.

Before concluding we repeat that we are not intending to express any opinion as to the effect of the testimony as a whole, or to intimate what the verdict of a jury ought to be, nor do we mean to imply that there must be satisfactory evidence of the actual cost of supervision. All we mean to decide is that there was sufficient testimony to go to the jury and obtain its judgment whether the ordinance passed by the city and the charges imposed thereby were, considering all the circumstances of the case, reasonable or oppressive.

The judgment is reversed and the case remanded with instructions to set aside the verdict and grant a new trial.

Mr. Justice WHITE, Mr. Justice PECKHAM and Mr. Justice MCKENNA concurred in the judgment.

True copy.

Test:

Clerk Supreme Court, U. S.